Mr. Justice GRIER concurred with Mr. Justice Woodbury in the opinion delivered by him, so far as it related to the question of the jurisdiction of courts of admiralty, and also that the weight of evidence in this case was against the existence of a tide at the place of collision, but concurred with the majority of the court that the De Soto was in fault, and justly holden for the whole loss occasioned by the collision.

SAMUEL THURLOW, PLAINTIFF IN ERROR, *v.* THE COMMONWEALTH OF MASSACHUSETTS.

JOEL FLETCHER, PLAINTIFF IN ERROR, *v.* THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS.

ANDREW PEIRCE, JR., AND THOMAS W. PEIRCE, PLAINTIFFS IN ERROR, *v.* THE STATE OF NEW HAMPSHIRE.

Laws of Massachusetts, providing that no person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, and that nothing in the law should be so construed as to require the county commissioners to grant any licenses, when in their opinion the public good does not require them to be granted,—

Of Rhode Island, forbidding the sale of rum, gin, brandy, &c., in a less quantity than ten gallons, although in this case the brandy which was sold was duly imported from France into the United States, and purchased by the party indicted from the original importer,—

Of New Hampshire, imposing similar restrictions to the foregoing upon licenses, although in this case the article sold was a barrel of American gin, purchased in Boston and carried coastwise to the landing at Piscataqua Bridge and there sold in the same barrel,—

All adjudged to be not inconsistent with any of the provisions of the constitution of the United States or acts of Congress under it.

THESE cases were all brought up from the respective State courts by writs of error issued under the twenty-fifth section of the Judiciary Act, and were commonly known by the name of the License Cases.

Involving the same question, they were argued together, but by different counsel. When the decision of the court was pronounced, it was not accompanied by any opinion of the court, as such. But six of the justices gave separate opinions, each for himself. Four of them treated the cases collectively in one opinion, whilst the remaining two expressed opinions in the cases separately. Hence it becomes necessary for the reporter to make a statement in each case, and to postpone the opinions until the completion of all the statements. The arguments of counsel in each case will of course follow immediately after the statement in that case. They are placed in the order in which they are put by the Chief Justice in his opinion, but where the justices have given separate opinions in each case, the order is observed which they themselves have chosen.

Mr. Chief Justice Taney,	one opinion,	three cases.	(p. 573.)
Mr. Justice McLean,	three opinions.		
No.	Thurlow *v.* Massachusetts.		(p. 586.)
No.	Peirce *v.* New Hampshire.		(p. 593.)
No.	Fletcher *v.* Rhode Island.		(p. 596.)
Mr. Justice Catron,	two opinions.		
No	Peirce *v.* New Hampshire.		(p. 597.)
No	Thurlow *v.* Massachusetts.		(p. 609.)
Mr. Justice Daniel,	one opinion,	three cases.	(p. 611.)
Mr. Justice Woodbury,	one opinion,	three cases.	(p. 618.)
Mr. Justice Grier,	one opinion,	three cases.	(p. 631.)

To begin with the case of

THURLOW *v.* THE COMMONWEALTH OF MASSACHUSETTS.

This case was brought up from the Supreme Judicial Court of Massachusetts. The plaintiff in error was indicted and convicted, under the Revised Statutes of the State, for selling liquor without a license. The indictment contained several specifications, but they were all similar to the first, which was as follows: —

"The jurors, for the Commonwealth of Massachusetts, upon their oath present, that Samuel Thurlow, of Georgetown, in said county, trader, on the first day of May, in the year of our Lord one thousand eight hundred and forty-two, at said Georgetown, he not being then and there first licensed as a retailer of wine and spirits, as provided in the forty-seventh chapter of the Revised Statutes of said Commonwealth, and without any license therefor duly had according to law, did presume to be, and was, a retailer of wine, brandy, rum, and spirituous liquors, to one Samuel Goodale, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell to said Goodale two quarts of spirituous liquors, and no more, against the peace of said Commonwealth and the form of the statute in such case made and provided."

It becomes necessary to insert the forty-seventh chapter of the Revised Statutes, and also all act passed in 1837. They are as follows: —

Revised Statutes of Massachusetts, Chap. 47. — The Regulation of Licensed Houses.

"Section 1. No person shall presume to be an innholder, common victualler, or seller of wine, brandy, rum, or any other spirituous liquor, to be used in or about his house, or other buildings, unless he is first licensed as an innholder or common victualler, according to the provisions of this chapter, on pain of forfeiting one hundred dollars.

"Sect. 2. If any person shall sell any wine or spirituous liquor,

or any mixed liquor, part of which is spirituous, to be used in or about his house or other buildings, without being duly licensed as an innholder or common victualler, he shall forfeit for each offence twenty dollars.

"Sect. 3. No person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is [at] first licensed as a retailer of wine and spirits, as is provided in this chapter, on pain of forfeiting twenty dollars for each offence.

"Sect. 4. If any person, licensed to be a retailer as aforesaid, shall sell any of the above liquors, either mixed or unmixed, to be used in or about his house or shop, he shall forfeit for each offence twenty dollars.

"Sect. 5. Every innholder shall at all times be furnished with suitable provisions and lodging for strangers and travellers, and with stable-room, hay, and provender for their horses and cattle; and if he shall not be at all times so provided, the county commissioners may revoke his license.

"Sect. 6. Every common victualler shall have all the rights and privileges, and be subject to all the duties and obligations, of innholders, excepting that he shall not be required to furnish lodgings for travellers, nor stable-room, hay, and provender for horses and cattle.

"Sect. 7. Every innholder and common victualler shall at all times have a board or sign affixed to his house, shop, cellar, or store, or in some conspicuous place near the same, with his name at large thereon, and the employment for which he is licensed, on pain of forfeiting twenty dollars.

"Sect. 8. If any innholder shall, when requested, refuse to receive and make suitable provisions for strangers and travellers, and their horses and cattle, he shall, upon conviction thereof before the Court of Common Pleas, be punished by a fine not exceeding fifty dollars, and shall also, by order of the said court, be deprived of his license; and the court shall order the sheriff or his deputy forthwith to cause his sign to be taken down.

"Sect. 9. No innholder or common victualler shall have or keep in or about his house, or other buildings, yards, and gardens, or dependencies, any dice, cards, bowls, billiards, quoits, or other implements used in gaming, nor shall suffer any person resorting thither to use or exercise any of said games, or any other unlawful game or sport within his said premises, on pain of forfeiting ten dollars for every such offence.

"Sect. 10. Every person convicted of using or exercising any of the games aforesaid, in or about any such house or building of an innholder or common victualler, shall forfeit ten dollars.

"Sect. 11. No innholder or common victualler shall suffer any

person to drink to drunkenness or excess in his premises, nor suffer any minor or servant, travellers excepted, to have any strong drink there, on pain of forfeiting five dollars for each offence.

"Sect. 12. If any innholder or common victualler shall trust or give credit to any person for liquor, he shall lose and forfeit all the sums so trusted or credited, and all actions brought for such debt shall be utterly barred; and the defendant in such action may plead the matter specially, or may give it in evidence under the general issue.

"Sect. 13. If any common victualler shall keep open his house, cellar, shop, store, or place of business on any part of the Lord's day or evening, or at a later hour than ten of the o'clock in the evening of any other day of the week, and entertain any person therein by selling him any spirituous or strong liquor, he shall forfeit for each offence ten dollars.

"Sect. 14. When any person shall, by excessive drinking of spirituous liquors, so misspend, waste, or lessen his estate as thereby either to expose himself or his family to want or indigent circumstances, or the town to which he belongs to expense for the maintenance of him or his family, or shall so habitually indulge himself in the use of spirituous liquors as thereby greatly to injure his health or endanger the loss thereof, the selectmen of the town in which such spendthrift lives shall, in writing under their hands, forbid all licensed innholders, common victuallers, and retailers of the same town, to sell to him any spirituous or strong liquors aforesaid for the space of one year; and they may in like manner forbid the selling of any such liquors to the said spendthrift by the said licensed persons of any other town to which the spendthrift may resort for the same; and the city clerk of the city of Boston shall, under the direction of the mayor and aldermen thereof, issue a like prohibition as to any such spendthrift in the said city.

"Sect. 15. The said mayor and aldermen, and said selectmen, shall, in the same manner, from year to year, renew such prohibition as to all such persons as have not, in their opinion, reformed within the year; and if any innholder, common victualler, or retailer shall, during any such prohibition, sell to any such prohibited person any such spirituous liquor, he shall forfeit for each offence twenty dollars.

"Sect. 16. When the said mayor and aldermen, or selectmen, in execution of the foregoing provisions, shall have prohibited the sale of spirituous liquors to any such spendthrift, if any person shall, with a knowledge of said prohibition, give, sell, purchase, or procure for and in behalf of such prohibited person, or for his use, any such spirituous liquors, he shall forfeit for each offence twenty dollars.

"Sect. 17. The commissioners in the several counties may license, for the towns in their respective counties, as many persons to

be innholders or retailers therein as they shall think the public good may require; and the mayor and aldermen of the city of Boston may, in like manner, license innholders and retailers in the said city; and the Court of Common Pleas in the county of Suffolk may, in like manner, license innholders and retailers in the town of Chelsea; and every license, either to an innholder or retailer, shall contain a specification of the street, lane, alley, or other place, and the number of the building, or some other particular description thereof, where such licensed person shall exercise his employment; and the license shall not protect any such person from the penalties provided in this chapter for exercising his employment in any other place than that which is specified in the license.

"Sect. 18. The mayor and aldermen of the city of Boston may license, for the said city, as many persons to be common victuallers as they shall think the public good may require; and every such license shall contain such a specification or description, as is mentioned in the preceding section, of the street or other place, and of the building where the licensed person shall exercise his employment; and the license shall not protect him from the penalties provided in this chapter for exercising it in any other place.

"Sect. 19. All licenses to any innholder, retailer, or common victualler shall expire on the first day of April in each year; but any license may be granted or renewed at any time during the preceding month of March, to take effect from the said first day of April, and after that day they may be granted for the remainder of the year, whenever the officers authorized to grant the same shall deem it expedient.

"Sect. 20. Every person, who shall be licensed as before provided in this chapter, shall pay therefor to the clerk of the city of Boston, the clerk of the Court of Common Pleas for the county of Suffolk, or to the clerk of the commissioners of the respective counties so licensing said person, one dollar, which shall be paid by said clerks to the treasurers of their respective counties for the use of said counties; and such persons shall also pay twenty cents to the use of the said clerks respectively; and no other fee or excise whatever shall be taken from any person applying for or receiving a license under the provisions of this chapter.

"Sect. 21. Any license to an innholder, retailer, or common victualler may be so framed as to authorize the licensed person to sell wine, beer, ale, cider, or any other fermented liquors, and not to authorize him to sell brandy, rum, or any other spirituous liquor; and no excise or fee shall be required for such a license.

"Sect. 22. The clerk of the commissioners in the several counties shall, seasonably, before the time for granting licenses in each year, transmit to the selectmen of every town within the county a list of the persons in such town who were licensed as innholders or retailers the preceding year.

"Sect. 23. No license shall be granted or renewed to any person, unless he shall produce a certificate from the selectmen of the town for which he applies to be licensed, in substance as follows, to wit: — We, the subscribers, a majority of the selectmen of the town of , do hereby certify that has applied to us to be recommended as (here expressing the employment, and a particular description of the place for which the license is applied for) in the said town, and that, after mature consideration had thereon, at a meeting held for that purpose, at which we were each of us present, we are of opinion that the petition of said be granted, he being, to the best of our knowledge and behalf, a person of good moral character.

"Sect. 24. Any person, producing such certificate of the selectmen, shall be heard, and his application decided upon, either on a motion made orally by himself or his counsel, or upon a petition in writing, as he shall elect.

"Sect. 25. If the selectmen of any town shall unreasonably neglect or refuse to make and deliver such a certificate, either for the original granting or the renewal of a license, the person aggrieved thereby may apply for a license to the commissioners, first giving twenty-four hours' notice to a majority of the said selectmen of his intended application, so that they may appear, if they see fit, to object thereto; and if on such application it shall appear that the said selectmen did unreasonably neglect or refuse to give the said certificate, and that the public good requires that the license should be granted, the commissioners may grant the same.

"Sect. 26. All the fines imposed by this chapter may be recovered by indictment, to the use of the county where the offence is committed; and when the fine does not exceed twenty dollars, the offence may be prosecuted before a justice of the peace, subject to the right of appeal to the Court of Common Pleas, as in other cases.

"Sect 27. When any person shall be convicted under the provisions of this chapter, and shall fail to pay the fine awarded against him, he may be imprisoned in the common jail for a time not exceeding ninety days, at the discretion of the court or justice before whom the trial may be had.

"Sect. 28. All prosecutions, under the provisions of this chapter, for offences committed in the city of Boston (excepting where the fine exceeds twenty dollars), may be heard and determined in the Police Court, subject to the right of appeal to the Municipal Court; but the said Police Court shall not have power, in any such case, to sentence any person to imprisonment, except as provided in the preceding section.

"Sect. 29. Any person, licensed under the provisions of this chapter, who shall have been twice before convicted of a breach of any of the said provisions, shall thereupon, in addition to the penal

ties before provided, be liable to a further punishment, by imprisonment in the common jail, for a time not exceeding ninety days, at the discretion of the court before whom the trial may be had."

Acts of 1837, *Chapter* 242.

"An Act concerning Licensed Houses, and the Sale of Intoxicating Liquors.

"Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows: —

"Sect. 1. No licensed innholder, or other person, shall sell any intoxicating liquor on Sunday, on pain of forfeiting twenty dollars for each offence, to be recovered in the manner and for the use provided in the twenty-sixth section of the forty-seventh chapter of the Revised Statutes.

"Sect. 2. Any license to an innholder, or common victualler, may be so framed as to authorize the licensed person to keep an inn or victualling-house without authority to sell any intoxicating liquor, and no excise or fee shall be required for such license: Provided, that nothing contained in this act, or in the forty-seventh chapter of the Revised Statutes, shall be so construed as to require the county commissioners to grant any licenses, when in their opinion the public good does not require them to be granted.

"Sect. 3. Any person who shall have been licensed according to the provisions of the forty-seventh chapter of the Revised Statutes, or of this act, and who shall have been twice convicted of a breach of this act or of that chapter, shall, on such second conviction, in addition to the penalties prescribed for such offence, be adjudged to have forfeited his license.

"Sect. 4. Any person who shall have been three times convicted of a breach of this act, or of the forty-seventh chapter of the Revised Statutes, shall, upon such third conviction, in addition to the penalties in this act and said chapter provided, be liable to be imprisoned in the common jail, for a time not exceeding ninety days, at the discretion of the court before whom the trial may be had.

"Sect. 5. The secretary of this Commonwealth shall cause a condensed summary of all laws relating to innholders, retailers, and licensed houses to be printed for the use of this Commonwealth, and he shall supply the county commissioners for the several counties, and such other officers as by law are authorized to grant licenses, with the same; and the said commissioners, or other officers, whenever they grant any license, shall furnish each person so licensed with one copy of said license laws, to the end that such person may know to what duties, restrictions, and liabilities he is subjected by law."

[Approved by the Governor, April 20, 1837.]

A conviction having taken place under the indictment upon these statutes, the defendant filed several exceptions, of which it is material to notice only the following: —

"2. It appeared upon the trial that some of the sales charged in the indictment were of foreign liquors, and his Honor directed the jury that the license law of this Commonwealth applied as well to imported spirits as to domestic, and that this Commonwealth could constitutionally control the sale of foreign spirits by retail, and that said law is not inconsistent with constitution or revenue laws of the United States. To this ruling also the defendant excepts."

The court below allowed this exception, together with all the others, upon which the case was removed to the Supreme Judicial Court. But that court overruled the exceptions, and ordered judgment to be entered upon the verdict.

Mr. Hallett, the counsel for Thurlow, then applied for, and obtained, a writ of error to bring the case to the Supreme Court of the United States, upon the following allegation of error, viz.: —

"That the several acts of the legislature of Massachusetts concerning licensed houses and the sale of intoxicating liquors, and especially the acts which are hereto appended and set out as part of the record in the said cause, upon which said judgment was founded, and also the opinion and judgment of said Supreme Judicial Court of Massachusetts, in the application and construction of said acts to the sales of imported foreign liquors and spirits by the said Thurlow, are repugnant to, and inconsistent with, the provisions of the constitution, treaties, and laws of the United States, in so far as the said acts, and the construction thereon by the said Supreme Judicial Court of Massachusetts, prohibit, restrain, control, or prevent the sale of imported wines and spirituous liquors, by retail or otherwise, in the said State of Massachusetts, and are therefore void."

Upon the writ of error thus issued, the case came up to this court.

It was argued in January, 1845, by *Mr. Choate* and *Mr. Webster*, for the plaintiff in error, and *Mr. Huntington*, for the State. Being ordered to be reargued, it was now argued by *Mr. Webster* alone, for the plaintiff in error, and *Mr. Davis*, for the State.

Mr. Webster opened the case. The best mode of presenting his views of the points which arose will be, to reprint the brief filed by himself and *Mr. Choate* in the former argument. It was as follows: —

The plaintiff in error, a citizen of the United States, living in Massachusetts, was convicted, under the Revised Statutes of that State, ch. 47, and the statute of that State of 1837, ch. 242, of sales of foreign spirits, made in 1841 and 1842, without a license. He seeks to reverse the judgment, upon the general ground that those statutes are repugnant to constitutional acts of Congress, and to the constitution of the United States; and contends,

1st. That they prohibit even the importer of foreign spirits from selling them in the bottle, keg, or cask in which he imports them, either for consumption at the place of sale, or for carrying away; and are therefore unconstitutional, within the case of Brown v. Maryland, 12 Wheat. 419.

2d. That they are void, as being repugnant to the legislation of Congress, in their application to purchasers from importers, of whom the plaintiff is one; and hereunder he submits the following analysis of his argument.

1st. The statutes of Massachusetts are not auxiliary to, cooperative with, and merely regulative of, the legislation of Congress, which admits foreign spirits to importation under prescribed rates of duty, but are antagonistical to and in contravention of it, since they seek to diminish and discourage the sales of imported spirits to a greater degree than the legislation of Congress seeks to do it, upon the ground that the policy of Congress in this behalf is an erroneous policy.

To maintain this, the object and operation of the Massachusetts statutes, and the policy and the principle of constitutional power upon which they proceed, are to be considered.

Without a license, no one can sell, in a single instance, spirits to be used on the premises of the vendor, and no one can sell them for the purpose of being carried away, in a less quantity than twenty-eight gallons, which must be bought and removed all at one time.

The result, therefore, is, that without a license no one can sell spirits to be used, or to be carried away for use, since no one purchases for use so large a quantity as twenty-eight gallons to be carried away at one time.

Without a license, therefore, no one can sell at all by retail; and the retail trade in spirits, the sale of spirits for use, is suppressed.

2d. No one is entitled to a license, or can exact it, whatever be his character or fitness to trade.

No court or person is required to give a license. A tribunal called county commissioners, chosen by the people of the counties, may, if in its judgment the public good requires it, grant licenses; but even in such case is not required to grant them.

For the last six years none have been granted in the county of the plaintiff's residence, containing more than one hundred thousand inhabitants.

This withholding of licenses is no fraud on the Massachusetts statutes, but in perfect conformity with them.

In conformity with the law, then, all sales of spirits for use may be totally prohibited in Massachusetts.

These laws design to do just what can be legally, and without defrauding them, done under them.

They design, then, to restrain all sales of spirits for use; and they do this upon a general principle of policy, to wit: that such sales, for such purpose, by whomsoever made, are a public evil.

The difference, therefore, between them and all laws of mere policy, of quarantine, health, harbours, storage of gunpowder, and the like, is, that those laws are auxiliary to, in aid and furtherance of, cooperative with, the Congressional legislation, while these deny its policy, and thwart and restrain its operations.

These statutes do not confine themselves to providing for suitable persons, places, and modes of selling foreign spirits, so as to secure the largest amount of traffic in the most expedient and prudent manner; but they mean, substantially and effectually, to put an end to the traffic.

The plaintiff in error, therefore, will discuss these laws, as if they did, in terms, prohibit all persons who buy of importers from reselling, since they do substantially so operate; and they assert a principle of power broad enough to go to that extent.

The general question, therefore, is this. Is a State law, prohibiting purchasers of spirits from importers to resell, on the ground that, for moral, medical, economical, or other reasons, the public good will not be promoted by such sale, repugnant to the acts of Congress, and to treaties authorizing importations of such spirits?

These sales were in 1841, and subsequent. The acts of Congress are, 1832, ch. 227, 4 Statutes at Large, 583; 1833, ch. 55, 4 ibid. 629; 4 ibid. 25; 3 ibid. 310.

These authorize importations in casks of fifteen gallons.

2d. What is the extent of the effect of an act of Congress authorizing importations?

1. Regarded as a license to, or contract with, the importer, communicating a right to sell, according to the view in Brown v. Maryland, 447, what is its extent?

The plaintiff contends that it would be repugnant to, and in fraud of, the license, either to ordain that no one shall buy of the importer, or to ordain that no one, having bought, shall resell, because either prohibition would totally defeat the license itself. The license is a license to carry the article to market, to trade in it, to have access with it to the consuming capacity of the country.

The grounds on which Congress legislate, in passing such an act, and the just expectations and reasonings of the importer, prove this.

The interception of the article in the hands of the first buyer, on its way to a market, excludes it from market, and shuts the importer from the country as really as if he were prohibited to sell.

2. Regarded as Congressional legislation, an act authorizing importations of spirits is a legislative determination that the foreign article may properly, and shall, enter into the consumption of the country, and be sold in the interior market thereof; and the Massachusetts statutes are intended to contravene that determination, upon a directly opposite view of policy.

3. Congress has the constitutional power to determine, on general grounds of policy, what foreign articles shall enter into the con-

sumption of the country, and be sold in the domestic market, and to what extent; and it exercises this power by an act laying duties. It determines that all which can be introduced and sold under such a rate of duties shall be, and the power of the States is merely auxiliary, coöperative, and regulative, securing proper persons by whom the traffic shall be conducted, but not discountenancing and discouraging the traffic itself. That power these statutes transcend.

It may be proper, also, in this connection, to reprint the abstract of the argument of *Mr. Hallett*, upon the same side, to show the reasons given for the doctrine sustained by the counsel for the plaintiff in error. *Mr. Hallett's* abstract was as follows: —

Are the laws of Massachusetts concerning the sale of imported wines and spirits constitutional and valid?

We contend they are not, because, —

1. No State can prohibit, by wholesale or retail, the sale of merchandise authorized by a valid law of Congress, or by treaties, to be imported into its markets; the retail sale being as indispensable to the object of importation, viz. use and consumption, as the wholesale.

2. The laws of the United States nowhere recognize any distinction between the wholesale and retail of imported merchandise, as connected with the right of the importer to introduce such merchandise, for use and consumption, into the markets of the United States.

3. Every concurrent or other power in a State is subject in its exercise to this limitation, that in the event of collision, the law of the State must yield to the law of Congress, constitutionally passed. New York *v.* Miln, 11 Peters, 102; Commonwealth *v.* Kimball, 24 Pick. 359.

4. If Congress has the power to regulate a subject-matter, a State cannot interfere to oppose or impede such regulation. The general government, though limited, is supreme as to those objects over which it has power. Martin *v.* Hunter, 1 Wheat. 304; Cohens *v.* Virginia, 6 Wheat. 384; Prigg *v.* Pennsylvania, 16 Peters, 539.

5. The commerce which Congress may regulate is something more than traffic. It is every species of commercial intercourse between the United States and foreign nations, and among the several States. "These words [regulate commerce] comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and another to which this power does not extend." Gibbons *v.* Ogden, 9 Wheat. 189, 193, 194.

6. The exercise of the power of a State to regulate its internal commerce must not conflict with, and cannot control, the power of Congress to regulate foreign commerce, and commerce among the States. The internal commerce on which a State can act, inde-

pendent of a law of Congress affecting the same, must be trade, or dealing in articles not connected with the operation of a valid law of the United States. It must be "completely internal," local, and not connected with the United States government, in the exercise of its power to regulate commerce, and to lay and collect duties and imposts.

7. "The power [of the United States] to regulate commerce, must not terminate at the boundaries of the State, but must enter its interior. The power is coextensive with the subject on which it acts." Brown v. Maryland, 12 Wheat. 446.

8. If a State, under the power of regulating her internal commerce, can exclusively regulate or control (to the extent of prohibition) commerce in imported merchandise, up to her boundaries, or the instant it shall pass, in bulk, from the hands of the importer, she can thereby exclude foreign commerce, and deny her markets to foreign nations.

9. If a State has no such power of prohibition, she cannot empower her officers or agents to do what she cannot do herself, viz., prohibit internal commerce in foreign merchandise. Suppose the legislature of Massachusetts, instead of conferring this power of prohibition upon county commissioners, to be exercised in their uncontrolled discretion, should retain it, to be exercised by herself; it would be unlawful legislation, and collision of a State law with a law of the United States.

10. The laws of Massachusetts, of which the plaintiff in error complains as unconstitutional, are, in respect to commerce and trade in this description of imported merchandise, a law of prohibition, because they assume to provide for licenses to persons to sell, and then empower the agents they create to refuse all such licenses, without cause; and it punishes all sellers in quantities less than twenty-eight gallons, without such license; and, in fact, no such license can be obtained. Both the intent and the operation of these laws are, therefore, prohibitory.

11. If it be said that it depends upon the administration of this law, whether it be constitutional or not, and therefore a law may be constitutional though its operation may be unconstitutional, the answer is, that a State cannot so frame a law as that under one sort of administration it is constitutional, and under another unconstitutional, and both operations be lawful, and thus the law be valid.

12. If a law of a State provides for and contemplates collision with a law of the United States, the former is invalid, and must yield whenever the collision arises.

13. The counsel for the Commonwealth of Massachusetts admits that the law complained of becomes prohibitory against this description of imported merchandise, whenever the public sentiment of a majority electing the county commissioners requires prohibition. If this be valid State legislation, then the power of Congress to reg-

ulate commerce in imported merchandise is subordinate to the disposition of the legislature of a State to exclude it from their markets.

14. The laws of Congress make no distinction between commerce in imported wines and spirits and other foreign merchandise. A recognition of the power of a State to exclude the first from its markets, whenever public sentiment requires it, must embrace the like power in respect to all other descriptions of imports, whenever the public sentiment in a State demands its exercise.

15. There is no preëminence given to that class of State legislation denominated police laws over other laws, whenever they come in collision with the lawful exercise of a power of Congress; and in such case the latter, by the terms of the constitution, shall be the supreme law of the land.

16. The law of Massachussetts in question is not a health law against contagion or infection in the article imported; it aims to keep it out of the hands of the consumer, on the ground of its abuse in excess of use. Health laws may exclude all such portions or cargoes of an article of commerce as are infectious; but they cannot exclude a whole class of imported merchandise, on the ground that infected portions or cargoes of it have been, or may be, imported.

17. Infected articles of commerce may rightfully be excluded from passing the boundary of a State, and reaching the hands of the importer, as well as the consumer. But a State cannot (under Brown v. Maryland, 12 Wheat.) exclude imported wines and spirits, or any sound article of commerce, from reaching the importer; and this is an obvious distinction between health laws and a law of prohibition to cut off the transfer of a sound article from the importer to the consumer.

18. The point where regulation ceases and prohibition begins is the point of collision, and of unconstitutional operation, of a State law affecting foreign commerce. In this respect a State law becomes a law of prohibition when it punishes all who sell without license, and confers the whole power of licensing on agents, with express authority to withhold all licenses.

19. In any and all cases, the power to deny sale includes the power to prohibit importation; and the question of power is the same, whether exercised directly by the legislature, or indirectly by its agents thereto authorized.

20. The operation of the law of Massachusetts on foreign wines and spirits deprives imported articles of their vendible quality. This such law cannot rightfully do, for the whole course of legislation by Congress shows that the right to sell is connected with the payment of duties, and the right to sell must extend beyond the importer, or it is an inoperative right.

21. The argument on the other side is, that if the power to

regulate commerce can follow the imported article, with its vendible quality attached, into a State, it can compel consumption by the citizens of that State. This confounds the mere commercial right to offer for sale with the power to force purchase. All the law of Congress requires in the markets of the United States is a right to sell and buy; and when this right ceases, commerce ceases.

22. The counsel on the other side further argues, that the State has a right to deny this commerce, whenever her citizens do not wish to deal in it. But if they do not desire to purchase, there would be no need of a prohibition of sale. The law of prohibition proceeds on the ground, that if commerce in this article were not denied, there would be such commerce; and therefore it directly interferes with the law of Congress regulating that commerce.

23. A State may pass all such laws as she pleases for the safety, health, or morals of her people, and may use whatever means she may think proper to that end, subject only to this limitation, that in the event of collision with a law of Congress, the State must yield. Commonwealth *v.* Kimball, 24 Pick. 363.

24. Now, Congress, by law and by treaties, authorizes foreign commerce with the States in wines and spirits. By the treaty of indemnity with France, in 1832, the wines of France were "admitted to consumption in the markets of the United States." The law of Massachusetts shuts her markets against the fair and just operation of these laws and treaties of the United States, and renders them so far inoperative.

25. The general view as to the prohibitory provisions of the laws of Massachusetts in this matter, taken together, is, that it is a blending of two powers to be exercised at pleasure under the statute: one legitimate, — to regulate; the other unconstitutional, — to prohibit, whenever the public sentiment in the State comes up to that point.

26. Massachusetts assumes to abolish foreign commerce in her markets in imported spirits, on the ground of thereby preserving the health and morals of the people; but at the same time, in her internal commerce and exports, she encourages, without tax or excise, an annual manufacture by her citizens of 5,177,910 gallons of domestic spirits, which is one eighth part of the whole product of the United States in spirits distilled from molasses and grain.

27. Congress has not changed its policy in this respect, but Massachusetts has changed hers, in opposition to the laws of Congress. Until 1837, the laws of Massachusetts uniformly provided for the sale and consumption of wines and ardent spirits imported into her markets. The act of 1786, ch. 68 (1 Mass. Laws, 297), was in force with additional acts till 1832. By section fifteen, the general sessions were not to license more persons in any town than they shall judge necessary for refreshment of travellers,

or are necessary for the public good, by which was meant the public convenience. Act of 1792, ch. 25, p. 417, required all persons to be licensed, on satisfactory evidence of fitness, and that such license will be subservient to the public good. Additional Acts, 1807, ch. 127; 1816, ch. 112; 1818, ch. 65.

The act of 1832, ch. 166, reduced the maximum to ten gallons, and provided for a new class, victuallers. The commissioners to license, as innholders and retailers, as many applicants as they shall decide the public good may require. The law now in force (Rev. Stat., ch. 47, 1835) altered this provision to power to county commissioners to license as many persons as they shall think the public good may require.

Then followed the declaratory act of 1837, ch. 242, that the commissioners might withhold all licenses in their discretion.

The act of 1838, ch. 157 (commonly called The Fifteen-gallon Law), made penal all sales of spirituous liquors less than fifteen gallons; licensed only apothecaries to sell for medicine and the arts, and punished the sale by them, if to be drank; and repealed all laws inconsistent with this act.

This brought up the question of prohibition. The act was contested in the courts of Massachusetts as unconstitutional, but was not decided there before it was repealed, in 1840, without any reservations. The Supreme Court of that State thereupon decided, in 1840, that the repeal revived the preëxisting laws, chap. 47 of Rev. Stat., and chap. 242 of 1837 (Commonwealth v. Churchill, 2 Metcalf, 118). Since then no licenses have been granted. The plaintiff's first sale in the case at bar was in May, 1841, and this case has been brought up on writ of error as soon as the laws of Massachusetts and the decisions of her highest court have established prohibition as the law of that State.

28. The law of Massachusetts comes in collision with the power of Congress over revenue, which is a supreme power, used as a substitute for taxation. With this view, the constitution requires that "all duties shall be uniform throughout the United States."

If Massachusetts, by her laws, can exclude one or more articles of import, she pays so much less revenue than other States that admit all. This makes the operation unequal so far, arising from the legislation of Massachusetts adverse to the power of Congress to collect revenue in all the States. Suppose the duty on foreign wines and spirits to be one fourteenth part of all the revenue, the States can cut that off, if this legislation is valid; and, by the same rule, all other sources to collect revenue are wholly destroyed.

29. So of the treaty-making power. The United States has power to reciprocate its markets with the markets of foreign nations; but if a State can shut its markets against any one or more of the articles admitted, by denying sale, the United States cannot in good faith perform any such reciprocal engagement.

30. The laws of Massachusetts, therefore, which, by their provisions, and their operation in conformity to such provisions, prohibit all commerce in wines and spirits in quantities under twenty-eight gallons, are repugnant to the constitution and laws of the United States, —

1st. In the power to regulate foreign commerce.

2d. In the power to collect revenue on imports into the several States.

3d. In the equal apportionment of taxes and duties in all the States; and,

4th. In the power to make treaties.

Mr. Davis, for the State. The following is a sketch of the argument, and shows the positions assumed and maintained by him for the defendant in error.

The broad ground assumed by the plaintiff's counsel is, that the statute of Massachusetts is unconstitutional, because it "prohibits, restrains, controls, or prevents the sale of imported wines and spirituous liquors, by retail or otherwise, in the State."

To make the policy of Massachusetts, in restraining an indiscriminate traffic in intoxicating drinks, intelligible, we must understand its history, and the state and condition of things when the constitution of the United States was made.

The court has often declared, that in a complicated system, which establishes two governments over the same people, it is necessary, in considering questions of power, to look into contemporaneous facts; that the objects designed to be secured by the federal constitution may be understood, and, if possible, carried into effect.

The context of the instrument is not alone to be regarded, but the whole machinery of government; and care must be taken, in carrying out the fundamental principles, that the purpose of the framers is not frustrated.

As the power of Massachusetts to make laws restraining traffic in intoxicating drinks is denied, I shall, as a preliminary step, briefly state the history of her legislation upon this subject, and point out the consequences which will follow if this doctrine is maintained.

The law of Massachusetts was revised in 1836; but acts similar in principle, and nearly so in detail, have existed for more than two centuries, and been enforced by her judicial tribunals. Ancient Charters, 135, 314, 433; Laws of Mass., 1786, ch. 68; Revised Statutes, ch. 47, and several other statutes.

The law, substantantially as it now is, forbidding a sale without a license in less quantities than twenty-eight gallons, was made in 1786, and was in force when the federal constitution was ratified, and has, with immaterial modifications, remained so from that time to this.

From thence till this time, the revenue system of the United

States has been in force; and the laws which are now supposed to conflict have during all that time worked harmoniously together.

After a lapse of fifty-six years, it is now first discovered that the State is trenching upon the power of the United States, and impairing the revenue by restraining the sale of imported wines and spirits.

Let it be remembered, however, that the United States do not and have not complained of any wrong done by the State; nor has any question ever been agitated in that quarter, in regard to the diminution of the revenue; which makes it quite apparent that no serious inconvenience is felt.

While, however, I admit the right of the plaintiff to appeal to this court, I must observe, that, although this long acquiescence may not prove the law of the State to be constitutional, it establishes the fact that it has produced no noticeable or sensible influence upon the revenue or the revenue power of the United States. It would seem, also, to be a clear indication that the federal government is not hostile to the policy of Massachusetts, or anxious to promote drinking to increase the revenue.

It also proves, that the State has at all times during its organization as a body politic considered restraint in the traffic of spirits as essential to the public welfare.

But the State is not an exception to other communities in this respect, but has followed out a principle which has been maintained and enforced through all ages among the civilized nations.

Mr. Davis then proceeded to prove, from historical authority, that the ancient Egyptians, the Greeks, the Romans, and the more Eastern nations did, through most periods of their existence, maintain rigid and severe restrictions upon the use of wine, and that excessive indulgence at all times was esteemed criminal.

He referred also to China, and the bordering nations, where abstinence from intoxicating drinks was enforced as a religious duty. He referred also to the Western nations of Europe, whose opinions and laws were equally condemnatory of excessive indulgence, and remarked that but one opinion prevailed through all ages.

He said, that the common law of England and this country frowned upon intemperance, and held it to be without apology; for, while mental alienation by the providence of God was a justification of crime, when it occurred by drink it was not; but the party was held answerable, because his insanity was occasioned by his own folly.

Even in the new settlement of Oregon, made up of people congregated from different parts of the earth, the sale and manufacture of spirits was forbidden by law.

But there was no occasion to multiply proofs of public opinion, for intemperance was everywhere deprecated and lamented, and had almost everywhere fallen under the condemnation of legal re-

straint, by enactments for that purpose, or by taxation. Experience had everywhere proved that there was a proneness in the human appetite to excess which requires control.

It should be observed, that the ancients were unacquainted with alcohol, and used wine in its simplest and most unobjectionable forms; while upon the moderns the double duty is devolved of contending against the demoralizing effects of both.

The train of evils which mark the progress of intemperance is too obvious to require comment. It brings with it degradation of character, impairs the moral and physical energies, wastes the health, increases the number of paupers and criminals, undermines the morals, and sinks its victims to the lowest depths of vice and profligacy.

In proof of this, there were in New York, in 1845, 26,114 paupers, 6,245 of whom were reduced to that condition by intemperance. In the same year there were in Massachusetts 14,308, and 6,740 were addicted to excessive drinking.

In the Singsing penitentiary, in 1845, there were 861 convicts, and 504 of these had been intemperate. The returns of other poor-houses and penitentiaries are equally startling.

These facts prove that intemperance is an evil of all-pervading magnitude, and that all ages and communities have set upon it the seal of disapprobation.

Such being its character, and such the evils which it engenders, the Colony, the Province, and the State of Massachusetts held it to be an imperative duty to check its progress by suitable restraint, and to promote sobriety and temperance by wholesome regulations.

Her law stood upon her statute-book when the federal constitution was made, and there it still remains.

No argument can make the fact clearer, that she has at all times esteemed legal restraint as indispensable to the public welfare.

Suppose, then, that the law of the State should be held unconstitutional, and she should be denied the power to legislate upon the subject; what consequences would follow?

It will appear in the progress of this inquiry, that the United States have no power to regulate the traffic in wines and spirits within the States; and if the State has no such power, then the right is abrogated.

Is not such a result hostile to the intent of all parties to the constitution? The framers did not intend it, and the States could not have contemplated it.

The United States are as much interested in the preservation of life, health, and morals as the States can be, and the motive to avert pauperism, crime, and profligacy must, with them, be equally persuasive. The policy and duty of the federal and State governments must obviously be concurrent, and cannot be arrayed in hostile attitude without violence to both.

Neither the United States, nor the State of Massachusetts, could, therefore, when making the constitution, have anticipated the abrogation of this power; and if it has been done, it is contrary to the intent of the parties. This is inferable, not only from what has been stated, but from the fact that these parties have moved on in their respective spheres for fifty-six years, in the exercise of their respective claims to power, without conflict and without entertaining a suspicion that the State has been enforcing laws without authority and in violation of right.

It would be a singular result, and one to be deprecated, if, in giving construction to the constitution, the court should arrive at a conclusion injurious both to the United States and the States; a result which both would deplore as hostile to their best interests, and subversive of the purposes which they had in view when they entered into the constitutional compact.

Nothing but a commanding necessity can sanction such a step, and it never will be taken unless under an imperiously pressing sense of duty.

With such facts and circumstances as these surrounding it, we come to the consideration of the question, whether the law of Massachusetts is constitutional.

The plaintiff in error assumes the affirmative, and must establish the fact that it is incompatible with, or repugnant to, the constitution and laws of the United States.

It will not be denied that the federal government has no powers except such as are granted to it and are enumerated in the constitution.

On the other hand, it is equally clear and indisputable, that the States retain in themselves all powers not so granted or prohibited by the constitution. This is an irresistible inference; but the States made it doubly certain, by declaring in an amendment the fact, in the most clear and explicit terms.

While, therefore, the United States hold the powers which are granted, the States hold those which are not granted or prohibited, and both are fully sanctioned and maintained by the constitution.

The plaintiff, therefore, must maintain that Massachusetts has, in making her law, exercised a power not reserved to her.

He makes it a question concerning commerce. He contends that the law, in effect, regulates foreign trade, the power to do which is confided to the United States.

The ground assumed is, that the United States authorize importations, and levy upon them a duty for revenue; that the right to sell is incident to the right to import, and cannot be controlled or regulated by the State in such a manner as to diminish the sales or to impair the revenue.

The constitution declares, that Congress has power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

These words give all the authority which the United States have over commerce.

The power is manifestly limited to commerce with foreign nations, commerce among the States, and commerce with the Indian tribes. The grant covers these three kinds of commerce, and nothing more.

In this case, commerce with foreign nations alone is to be considered. The domestic commerce is necessarily excluded; for it is neither foreign, nor is it trade among the States, nor with the Indian tribes.

This inference is not only apparent from the language of the constitution, but is fully sustained by authority.

In Gibbons v. Ogden, 9 Wheat. 203, the court, in commenting on inspection laws, employ the following language: — "They form a portion of that immense mass of legislation which embraces every thing within the territory of a State, not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, are component parts of this mass. . . . . No direct general power over these objects is granted to Congress; and consequently they remain subject to State legislation."

Again, in the same case the court speak of the power to regulate the internal trade and commerce of a State as an acknowledged power of the State.

It is, therefore, judicially settled, that the power to regulate the internal commerce of a State is reserved to and resides in it.

Such being the partition of powers between the States and the United States, I come to the inquiry, What is the character of the law of Massachusetts? Upon what basis does it stand, and from what power or right in the State is it derived? And I shall contend that it is a regulation of the internal commerce of the State, having for its object the preservation of order, morals, and health, and intended to discourage intemperance and to promote sobriety. And such being its general characteristics, I shall also contend further, that it falls within that class of laws generally called police regulations.

The trade intended to be regulated is completely internal, and spread over the whole territory of the State. That the regulation of such a commerce belongs to the State is evident, not only from the authority cited, but from the language of the court at page 195 of the same case. "The completely internal commerce of a State," says Chief Justice Marshall, "then, may be considered as reserved for the State itself."

The State has furthermore a right to provide for the health of its citizens by police regulations. In Gibbons v. Ogden, 9 Wheat. 205,

the court say of quarantine and health laws, — "They are considered as flowing from the acknowledged power of the State to provide for the health of its citizens"; again, at page 208, "the acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens," is spoken of as unquestioned.

It may, then, be assumed on authority which does not admit of doubt, that a State has a right to regulate its internal commerce, and to provide for the health and government of its citizens by suitable laws. That such regulations are considered by this court to be police laws will not be doubted.

These propositions are sustained by high authority. The State possesses the undeniable right to regulate its internal trade, and to maintain municipal or police regulations to protect and promote the welfare of the people.

That a law restraining an indiscriminate traffic in wines and spirits, and designed to protect life and health by promoting temperance and sobriety, is a police law cannot be questioned.

The law of Massachusetts being, then, a measure relating to a trade completely internal, and a police regulation, is, in all its aspects, founded on an acknowledged power which is vested in the State by the provisions of the constitution.

This being the highest source of authority, it would seem sufficiently to justify and maintain the law.

But it is contended that even this foundation may fail a State in cases of conflict; for the law of the United States is supreme, and must, in such cases, prevail against the admitted right of a State.

Our system is obviously complicated, because the federal and State governments extend over the same territory and people, and act upon the same persons and things. For example, foreign commerce is destined to become internal, and internal to become foreign. This flux and reflux from jurisdiction to jurisdiction brings the laws into contact, and the jurisdictions impinge upon each other.

This opens the question, Which in such cases shall prevail? The answer has been, that federal power in such cases is paramount and supreme. This is sometimes said to be an axiom to which State authority must bow in submission. But if we admit the authority, the question still remains, How far does this implied supremacy extend over the acknowledged powers of the States? Is it unlimited, and must a State yield to its touch whenever felt? No one, I believe, will urge the doctrine to this extremity.

The decisions of this tribunal will establish the fact, that the supremacy of federal power in cases of conflict has boundaries and limits, and that the action of State laws derived from powers reserved to the States is never unconstitutional until it becomes incompatible with, or repugnant to, the federal laws.

But what is incompatibility? What is repugnancy? This in-

quiry often presents perplexing considerations, because no fixed, determinate rule can be laid down by which cases can be tested; but each case, as it comes up, is left to be decided by the facts which surround it. Whenever State power touches that of the United States, whoever may profit by it is anxious to make out a case of incompatibility or repugnancy, and thus every seeming conflict is liable to become a matter of judicial investigation; and there is a constant disposition manifested to expand the power of the general government, and to contract that of the States.

We are not, however, without authority which throws no inconsiderable light on this inquiry. The learned commentator upon the constitution, 1 Com. 432, after an examination of all the authorities, sums up the result: — "In cases of implied limitations or prohibitions of power [and this is one] it is not sufficient to show a possible or potential inconvenience. There must be a plain incompatibility, a direct repugnancy, or an extreme inconvenience, leading irresistibly to the same conclusion."

Under this rule a State may exercise its power in any way or form, and to any extent, if its action upon federal power does not amount to manifest incompatibility or direct repugnancy. The fact of incompatibility or repugnancy must not be equivocal, but clear and certain. In cases of incompatibility, it must be apparent that the laws of the United States and a State supposed to be in conflict cannot stand together, or be reconciled or harmonized with each other. The whole doctrine of repugnancy and incompatibility is confined within these narrow limits. It is applied, in fact, only to cases where the power of a State so acts upon a power of the United States as substantially to subvert or defeat it. In such cases only has the supremacy of the federal law been maintained over constitutional State power. The rule clearly implies, in all cases of doubt, that the power of the State is to prevail against this implied right of supremacy. Even potential inconvenience is not to be regarded, but must be tolerated as long as it falls short of incompatibility or repugnancy.

It requires but little consideration of the subject to justify these cautious limits of power; for if the laws of the State must recede before those of the United States whenever they come into contact, it is manifest that State power would be in imminent danger of being obliterated; for, as State power yields, federal power must follow and press upon it. The dangers which beset the exercise of power by sovereignties whose limits of authority are not ascertainable cannot be more forcibly described than in the language of the late chief justice, in McCulloch *v.* Maryland, 4 Wheat. 316, 430. After stating the grounds upon which the decision rested, the learned judge says: — "We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from repugnancy between a right in one government to pull down what there is an

acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve;—we are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree the abuse, of power." The court congratulated itself upon having discovered the limits of sovereignty without resorting to the implied right of supremacy on the part of the United States, which necessarily involved the most conflicting and dangerous considerations.

This case is but one among the many proofs given by this court of a uniform and anxious desire to give full and free scope to the powers of the respective governments, and to harmonize, if possible, their action, without asserting the supreme authority of the federal constitution over the acknowledged powers of the States. This can never be done when it subverts the lawful power of the States without creating alarm, and impairing the stability of the Union.

The cautious and almost reluctant manner in which this court have applied this doctrine of supremacy over acknowledged State power is manifest in many of its decisions, which prove incontestably its disposition to avoid such conflict if possible.

It has already been shown, from Gibbons v. Ogden, "that inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State," originate from powers which are reserved to the States. What is the character of those laws, and how are they executed? The answer will show how far the power of a State may be carried without incompatibility or repugnancy.

They deal with foreign commerce, asserting, as will appear by their provisions, absolute control over it for certain purposes which are connected with the public welfare and safety.

The inspection laws authorize the detention and examination of merchandise, and the imposition of marks which denote its true character, and often affect its value.

Quarantine laws direct possession to be taken of vessels arriving, and require them, with their crews, passengers, and cargoes, to be detained, and forbid intercourse with the shore

The health laws carry with them a similar authority, and provide not only for detention, but for the purification, and, if necessary, the destruction of the cargo.

In Brown v. Maryland, 12 Wheat. 443, the court observe, "that the power to direct the removal of gunpowder is a branch of the police power which unquestionably remains and ought to remain with the States." They add, also, that "the removal or destruction of infectious or unsound articles is undoubtedly a branch of the same power."

These laws interfere directly with foreign commerce, asserting a right to control men, vessels, and cargoes, before a voyage is completed.

Harbour laws, ballast laws, &c., are of a similar character, and hence it has been supposed that they are regulations of foreign commerce.

But this court repel this conclusion, and maintain their constitutionality, because they are police regulations of the States, and derived from a right reserved to make and execute such laws; and are not, therefore, regulations of foreign commerce, though, for the purposes of protecting life, health, and property, they necessarily deal with it. The court go farther, and also maintain, that such laws are not incompatible with or repugnant to the laws of the United States which relate to foreign commerce, and therefore no objection exists to the exercise of such power by the States over foreign commerce.

It is manifest from these authorities, that State power, and especially police power, may be exercised upon matters within the jurisdiction and under the control of the United States without incompatibility or repugnance. The protection of life, health, and property demand it. The right to do it is acknowledged, and cannot be questioned, unless its exercise defeats or subverts the power of the United States; then, and in such cases only, it is viewed as incompatible or repugnant.

This brings the doctrine of repugnancy and incompatibility, when asserted against the rightful power of a State, into narrow limits; and it is believed that no case has yet occurred before this court, in which the power of the United States, because it is supreme, has been extended by implication so as to defeat or overrule the acknowledged authority of a State, unless concurrent powers constitute an exception.

It is further manifest, that the right of a State to make police laws is unquestioned, because, as the court declare, it is among the reserved rights. This power, I have shown, has been and is exercised in a great variety of ways, and in many forms, over foreign commerce.

It is obvious, therefore, that it constitutes the boundaries of sovereignty, and is paramount to the power of the United States in all cases, except where it defeats or subverts the granted powers of the United States.

It is further obvious, that the court will not consider a State law, made in the exercise of lawful authority, and in the exercise of a power belonging to the State, a law regulating foreign commerce, though it may act upon and influence such commerce.

It is also obvious, that the court has never denied, but, on the other hand, has always admitted, the right of a State to make police regulations, to protect life, health, and the property of the citizens, and the right to extend this protection against the dangers incident to foreign commerce has uniformly been distinctly recognized.

It can neither be admitted nor maintained that the United States,

under a general power to regulate foreign commerce, has a right, without restraint, and in defiance of State powers, to import disease and pestilence, to fill the country with infamous persons, or to debauch the public morals. Such is not the design of the constitution; and if such a right shall be successfully asserted, it will soon prove that the federal and State governments cannot exist together.

Such are the restraints which oppose the extension of federal power, in cases of apparent conflict, on the ground that it is supreme.

A careful examination of the many decisions will prove that the court has anxiously studied to fix, as far as circumstances will permit, definite boundaries to sovereignty, leaving them to depend as little as possible upon questions of incompatibility or repugnancy.

The police laws of the State have uniformly been maintained, on the ground that the States have a right to make them, and this right is not to be questioned, although in the exercise of it the laws and power of the United States are and must be affected, or the remedy against alarming evils be incomplete. It seems to me that the court have practically, and for the best of reasons, placed such laws on the ground that they emanate from exclusive and independent powers enjoyed by the States.

This position has been gradually approached, with a watchful solicitude at every step taken in advance.

In New York *v.* Miln, 11 Peters, 102, a reëxamination of the authorities was made, and the grounds of the opinion there delivered are stated with great clearness (p. 139). After discussing the principles so ably laid down in Gibbons *v.* Ogden, the learned judge says: — "We do not place our opinion upon this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these, that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States; that, by virtue of this, it is not only the right but the bounden and solemn duty of a State to advance the happiness, the safety, and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated; that all those powers which relate to merely municipal legislation, or what may perhaps be more properly called internal police, are not thus surrendered or restrained; and that consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive."

This authority defines the great question of boundary between the sovereignties with an accurracy which cannot be mistaken, so far as regards police laws.

The powers not conceded or prohibited by the constitution re-

main in the States unchanged, unaltered, and unimpaired, and as fully in force as if no constitution had been made.

None of those powers which relate to municipal legislation or internal police have been surrendered or restrained, but are complete, unqualified, and exclusive.

If they are complete, the State has the whole and the sole enjoyment.

If they are unqualified, they remain as they were, unaltered and unchanged.

If they are exclusive, there can be no participation in them by another.

The inference is irresistible, that such powers are independent of and paramount to the constitution of the United States, and therefore not subject to any supreme power of the federal government in cases of conflict.

This is but carrying out the provisions of the instrument, as they apparently stand.

It is manifest, that the laws of the two governments must meet and mix, because the jurisdictions commingle, and the question is, Did not the framers of the constitution intend it should be so?

When they made that instrument, and gave to the United States the control over foreign commerce, and reserved to the States the police powers, they knew that life and health and property in the States must be provided for; and they knew then, as well as we do now, that it could not be done without an interference with foreign commerce. Did they not intend, then, when they granted this power to the United States, that it should be held and enjoyed subject to the exercise of these reserved powers in the States?

Such at least is the effect of this decision, if language has any meaning; and this case does little more than carry out the principles which had been previously maintained in practice.

The police laws had in fact everywhere been maintained against the supreme power of the United States, notwithstanding this obvious interference.

The pressure of this principle of supremacy was forced upon the States with such zeal, and the supposed cases of incompatibility became so frequent, that the exigencies of the times demanded a positive rule to the extent that it could be safely established.

The step was taken eleven years ago, and what inconvenience has been experienced? In what has the power of the United States been impaired or disturbed? Who has sensibly felt any change? Whose interests have not been well provided for, and safely protected? Much has been said and sung by the theorists; but the laws have been well harmonized, and the public have been well satisfied.

In regard to constitutional principle, this case is decisive of the one under consideration, as it admits the authority of a State to

maintain police regulations in regard to its internal affairs, whatever may be their effect or influence upon the laws of the United States.

All this is conceded when the power of the State is declared to be complete, unqualified, and exclusive. Commonwealth v. Kimball, 24 Pick. 365; Pierce in error v. New Hampshire, Law Reporter, Sept. 1845.

I have thus far, in speaking of constitutional power, assumed that the law of Massachusetts is a police measure, made in good faith, to regulate the traffic in intoxicating drinks.

This has, however, been questioned, on the supposition that it is, in fact, a regulation of foreign commerce.

It becomes necessary to look into its provisions, to ascertain whether they are adapted to the professed object, or designed to cover up a specious fraud.

The act requires all retailers, who sell in less quantities than twenty-eight gallons at a time, to first obtain a license from the proper authority.

The retailers are tavern-keepers, and small grocers, living wherever there is travel and population.

The design of the law is manifestly to prevent tippling and disorder, by promoting temperance and sobriety; and, whether it be a regulation of trade or police, or both, relates to affairs completely internal.

Is this a suitable matter to engage legislative attention? Does such a traffic demand restraint, or does the legislature employ it as a pretext to regulate foreign commerce?

I have already dwelt sufficiently on this point, and have proved that intemperance is everywhere deprecated and deplored, that the world has raised its voice in remonstrance against an indiscriminate traffic in wines and spirits, and it seems to me that if health, morals, usefulness, and respectability are worthy of public consideration, and merit protection against an insidious foe, the legislature would be criminally guilty in wholly disregarding a matter of such obvious importance; and that the exercise of the power needs no justification.

But are the provisions of the law suited to the professed object? The evident end in view is to place the trade in safe and suitable hands, in the custody of those who will use without abusing it, and mitigate, instead of aggravating, the evils incident to it.

To carry this principle out, the law authorizes the county commissioners, who are elected by the people, and supposed to be an exponent of public opinion, to license as many innholders and retailers as the public good requires. Can any one desire more?

If suitable persons are to be selected, the mode is probably as unobjectionable as any which can be devised; but if no selection is to be made, as is contended, and all persons are to have a right to demand a license, a law, with such provisions, would cease to be a regulation, and had better be abolished.

Another feature of the law is, that it makes no discrimination between foreign and domestic wines and spirits, but deals with all alike. This would seem to furnish sufficient proof that it has no special reference to the importing trade, but aims at a general regulation, and is designed to promote temperance and not to regulate foreign commerce.

When these facts are taken in connection with the antiquity of the policy, no reasonable doubt can exist as to the good faith and sincerity of purpose in the legislature.

But it is objected to the law, that the commissioners may so exercise their discretion as to impair or defeat the revenue.

This argument supposes that judicial officers will abuse their authority. But it is not a question as to the manner of using power, but of right.

A discretion is reposed in all judicial tribunals, where facts are to be ascertained as the foundation of a judgment. In all such cases, the law may be perverted ; but the abuse is proof of misconduct in the officer, and not of the unconstitutionality of the law.

Whether an applicant for a license is a suitable person, and whether the public good requires the grant to be made, are facts to be ascertained, which must depend upon evidence ; and the questions cannot be decided without an exercise of judgment.

It is difficult to comprehend how a selection of suitable persons, or of suitable places, can be made, without the exercise of so much discretion as such a decision implies. There is, in fact, no intermediate ground between this and indiscriminate traffic.

But it is further objected to this system, that its whole tendency is to reduce consumption, and to diminish the revenue.

The State has a right to regulate its internal trade, and to maintain police laws. No condition is annexed to this right, which requires the State to exercise the power without impairing the revenue upon imports. The law may have some remote effect on the revenue ; but what law or principle of the constitution forbids it ? There can be no repugnancy or incompatibility till the powers of the United States to raise revenue is substantially defeated.

Of such a state of things there is no proof. On the contrary, the license laws have been in operation for fifty-six years with the revenue system, and no sensible or noticeable effect has been produced ; not enough even to make it a topic of discussion.

If the whole revenue from this source were dried up, it could have little tendency to defeat or control the financial power of the United States, which is too broad and ample in resources to be materially affected by any such legislation.

But the argument proves too much, — it denies to a State the right to make a law which tends to impair the revenue of the United States.

The right of taxation is concurrent, and may be and is exercised

by both governments upon the same persons and property. This is an undeniable right in a State, and yet it is manifest that it cannot be exercised without impairing the resources of the United States.

Slaves are taxable property, and cannot be emancipated without diminishing the resources of revenue; but will it be contended that a law of emancipation is unconstitutional for that cause?

So, too, laws which establish market-days, and forbid sales upon the Sabbath, have a tendency to restrain indiscriminate traffic.

Without, however, pursuing this reasoning, which might be easily extended, I deny that a diminution in the consumption of wines and spirits raises any presumption that the general revenue is impaired by the process. On the contrary, my belief is, that, if the facts were to undergo the severest scrutiny, it would turn out quite otherwise. It has never been maintained that a free use of wines and spirits has any tendency to promote public prosperity, nor is it denied that an excessive use is manifestly prejudicial. There can be no doubt, that where abstinence or severe temperance prevails accumulation is increased and the means of subsistence enlarged. These ordinarily go to support existence, and, creating a greater expenditure in the necessaries and comforts of life, contribute in other forms to the revenue, giving a gain instead of a loss.

But it is urged that the commissioners may press their powers so far as to exclude consumption; and if they should, the revenue would probably suffer in no respect, as the general prosperity would be improved.

But, aside from this consideration, I apprehend there is no objection to such a step. Police laws may be carried to any extent which the public welfare demands. If the health, the morals, and the welfare of the public demand the exclusion of an evil, there is a right to shut it out, regardless of revenue and of private interests. This power may and should be exercised just to the extent which the public exigency demands.

Such is the long-established practice in regard to health. If the cargo of a vessel is infected and dangerous, it is destroyed; and all revenue and private interests are sacrificed for the public safety. Gunpowder is required to be landed and stored in a way which saves life and property from jeopardy. Ballast is required to be deposited where it does no mischief to navigation. The publication, by sale or otherwise, of obscene books, prints, pictures, &c., is an indictable offence.

Yet all such laws are undeniably constitutional, and are maintained as police regulations on the ground that the public health, morals, and property demand protection. The right to give this protection has never been successfully questioned; and it is evident that legal provisions in such behalf must be such as to meet the emergency. If excessive indulgence in the use of intoxicating drinks be an evil, and no one will question it, it is the right of the legislature to guard

against it by wise and prudent regulations; and such regulations obviously fall within the principle which sustains the laws referred to. If the evil be such as to demand stringent provisions, reaching to exclusion, there is no constitutional objection to such legislation.

But it is further urged, and some reliance seems to be placed upon it, that the county commissioners of Essex do in fact suppress sales by refusing to grant any licenses.

If such were the fact, the presumption would be, that they have done it because their duty required it, unless the contrary is proved. In New York *v.* Miln, the court pronounce pauperism to be a moral pestilence; but pauperism is but one of the many plagues which follow intemperance.

In this case, however, there is no proof of such an exercise of power by the commissioners. It does not appear that the plaintiff in error, or any one else, ever applied for and was refused a license, and an alleged abuse of power cannot be presumed in the absence of all proof. Before the plaintiff can lay any foundation for just cause of complaint, he must prove that he applied, being a suitable person for such an employment, and was refused, when the public good demanded that a license should be granted.

He makes no such case on the record, but places the law itself on trial, instead of the administration of it, and relies upon the proof which it contains on its face of its unconstitutionality.

The commissioners are not and cannot be placed on trial by this record, and whenever their conduct shall be arraigned in a proper manner, I have no doubt they will justify their decisions, whatever they may be.

Another objection which has been urged against the law of Massachusetts is hostility to the policy of the United States.

What is the policy of the United States on this subject? Are we to infer, without proof, that the United States are not equally interested with the State in promoting good morals, in protecting health, in preventing the waste of property and the increase of crime? How can the United States have less at stake than the State, or be less interested in cherishing the virtues which make a good population, or in discouraging the vices which lead to the opposite result?

On what ground can the promotion of sobriety and temperance be hostile to the policy of the United States? Is it their purpose to debauch public morals, to encourage a lavish waste of property, and to multiply crimes, from the mercenary consideration of deriving revenue from a process of degradation?

Does the policy of the United States war with the best interests of society, and are they anxious for revenue at such sacrifices? What proof is there of such an unnatural state of things?

It is supposed, that the United States countenance an indiscriminate traffic, because they permit wines and spirits to be imported,

and lay upon them a duty. This naked fact is alleged to be evidence of a declared purpose to raise the utmost revenue which can be realized, and that a law interfering with this design is unconstitutional?

If this be so, then the law of Massachusetts which punishes habitual drunkenness is unconstitutional, for it diminishes consumption; and the law which authorizes the appointment of guardians over such persons must share the same fate, as well as all other laws which in any way regulate trade so as to impose any restraint upon it.

But there is more decisive and satisfactory evidence of the policy of the United States than such remote, uncertain inferences.

In 1838, Congress invited the army to abandon the use of the spirit ration, and offered by law a substitute to all who would accept it, in sugar and coffee; and the same principle has been carried into the navy, and has met with approbation in both branches of the service.

In 1813, Congress passed a law, 3 Stat. at Large, 73, in which there is a clear and decisive expression of opinion. This law imposed internal taxes, and the collectors are authorized to grant licenses to sell at retail wines, distilled spirits, or merchandise, "provided always that no license shall be ganted to any person to sell wines, distilled spirituous liquors, or merchandise as aforesaid, who is prohibited to sell the same by any State."

Here is a clear expression of the views of Congress in regard to State legislation and State policy. It shows the deference and respect which it considered to be due to so important and delicate a subject, by conforming its legislation to that of the States, and adopting this policy. The law is now repealed, because the tax is abolished, but the opinion loses none of its weight or importance from that consideration.

Again; it has been suggested that the revenue laws, which permit wines to be imported in bottles, and brandy in kegs of fifteen gallons, are evidence that Congress intended to confer a right to sell in such quantities, and therefore the law of Massachusetts is repugnant to them.

This argument rests on the supposition that Congress has the right to regulate the internal trade of a State, while it is admitted that States alone possess this right. If, therefore, such were the intention of Congress, the acts would be void for unconstitutionality; for the federal government cannot claim a power denied to it.

But there is no reason for believing that those provisions were made with reference to any such object. They relate wholly to the custom-house and to exportation. Such is known to be the history of the fifteen-gallon kegs, and the same is doubtless true of wines.

It is a regulation of convenience, and designed to keep the im-

port trade in a form to prevent smuggling and frauds, either in importation or exportation.

These considerations go to maintain the conclusion, that the law of Massachusetts was made in good faith, and for the purposes indicated by it; that it is derived from powers distinctly reserved to the State, and is a regulation both of the internal commerce and police; that its provisions are adapted to the purposes for which they are designed; that it is not a regulation of foreign commerce, or of the revenue system, and does not affect either unlawfully; and that it is not hostile to the policy or interests of the United States.

It is evident, also, that it is sustained as a police measure by the whole current of authority antecedent to, as well as by, the case of New York v. Miln.

The plaintiff in error next contends, that an importer of wines and spirituous liquors has a right to sell them in the same vessels in which they are imported. He then alleges, that wines may be imported in bottles, and brandy in kegs of fifteen gallons, while the law of Massachusetts prohibits the sale in less quantity than twenty-eight gallons, without a license.

For the purposes of this case I might concede the position, for the plaintiff is not indicted for selling wines in the original bottle, or brandy in the original keg; but for dealing out spirituous liquors by retail in small quantities, from a quart or pint to a gallon.

The record does not show that he is an importer and vender in the original package or vessel, or that he ever had wine in bottles or brandy in kegs of fifteen gallons. If, therefore, the original importer has such a privilege, this plaintiff can make no pretension of right to it.

But from what authority is this right to sell in the original vessel derived?

The laws of the United States do permit the importation of wines in bottles, and brandy in kegs of fifteen gallons. Formerly, brandy could not be brought in, in vessels of less capacity than ninety gallons; but the quantity was reduced, as is well known, to favor the export to Mexico, where so large a quantity could not be taken into the interior upon pack-horses.

But if these laws were intended, as is supposed, to regulate the internal trade of the States, they could not be sustained; as Congress has no power or right to regulate that traffic. They have, however, never been understood to have any such bearing, but to be what they purport, regulations of imports and exports.

But the case of Brown v. Maryland, 12 Wheat. 419, is supposed to give some support to this position.

A law of Maryland forbid importers and venders in the original package the right of selling without first obtaining a license, for which fifty dollars were exacted. Brown, being such an importer

and vender, violated the law, was prosecuted, and the case finally decided by this court.

The court held, first, that the law of Maryland was a revenue act imposing a tax;

Secondly, that such a tax, imposed upon the importer as such, and before any right of sale could be exercised, was a duty on imports, and expressly prohibited by the plainest terms of the constitution, which forbids the States the right to lay duties on imports;

Thirdly, that such a duty, so levied, is a regulation of foreign commerce, and for that reason also unlawful.

The decision goes no further than to deny the power of a State to impose a tax upon the importer, as such, before he has made a sale; because this is, in effect, a duty on imports.

There is nothing in the case which questions the right of a State to exercise police power over imports and importers, for any of the great purposes to which such legislation is directed.

The principles which govern the decision are laid down with a clearness which cannot be mistaken.

The exemption from taxation is limited to the importer, and to a sale by him in the original package. The mischievous consequences of a more extended exemption were foreseen and guarded against, in order to leave the internal affairs of the States untouched.

The court, to prevent all misapprehensions, declare that a sale of such goods, a breaking up of the packages, or an appropriation of the articles to use, or any similar act, mixes the goods with the mass of property in the State, and extinguishes the privilege.

The exemption is, therefore, limited to the importer and vender by the original package, and is denied to all others.

The authority, consequently, furnishes no support or countenance to the case under consideration, as the plaintiff was neither an importer or vender by the original package.

But if the plaintiff were an importer, instead of a retailer, the case of Brown *v.* Maryland would furnish no justification for a violation of the law of Massachusetts.

The law is not a revenue act, but a police measure. It imposes no tax upon imports, and therefore does not fall within the prohibitory clause of the constitution.

The difference between the laws is this: the State of Maryland exercised a power prohibited; while the State of Massachusetts founds its legislation upon one which is conceded.

The health laws, quarantine laws, ballast laws, &c., prove that the police power may be extended to imports and importers, if the public safety or welfare demands it. If I am right, therefore, in assuming that the traffic in wines and spirits is a suitable object for regulation, the power of the State cannot be successfully questioned by importers and venders in the original package or vessel.

If, then, the plaintiff had proved all the facts which have been assumed, they would avail him nothing.

All the important questions which have been raised in the case have now been considered, imperfectly, no doubt; but, having been brought to the notice of the court, they will receive the consideration which their importance deserves.

The course of reasoning pursued is intended to establish the following positions: —

1. That the traffic in wines and spirituous liquors has, in the public judgment, as expressed through ages and centuries, demanded restraint and regulation.

That, the United States having no powers to impose such restraint, if it be denied to the States, the right is abolished.

That such a result would be alike injurious to both parties, and desired by neither.

That, under such circumstances, the court would be justified in declaring the law void only by commanding necessity, and that no such emergency exists.

2. That, in the partition of powers between the federal and State governments, the rights of the former are granted and enumerated in the constitution, while the latter retain all powers not granted or prohibited by that instrument.

That the grant of a right to regulate foreign commerce excludes the right to regulate domestic commerce, which is left in the States.

That the right to make police regulations is also left in the States.

That the law of Massachusetts belongs to these classes, and is derived from lawful, constitutional power vested in the State.

3. That, if the right of a State to maintain police laws is complete and unqualified, there can be no constitutional conflict with the laws of the United States, as the power is absolute and supreme.

But whether this be so or not, the right of the State to regulate its internal traffic and police is acknowledged, and can never be questioned, except in cases of manifest incompatibility or direct repugnancy, and there is no proof that the law of Massachusetts has any such action, effect, or influence on the powers or laws of the United States.

4. That the United States having a right to regulate foreign commerce is bounded by the point where such commerce becomes internal, and cannot follow it for the purposes of regulation or control after it becomes subject to State authority, without usurping the constitutional power of the State.

5. That the plaintiff in error was indicted and convicted for retailing spirits without a license, being neither an importer nor vender of such spirits in the same vessels and quantities as imported.

That if he had been such an importer and vender, it would avail him nothing, as the question before the court does not relate to taxation, or fall within the prohibitory clause of the constitution, but

regards the right of the State to regulate its internal commerce and police after the work of the United States is completed, so far as foreign commerce is concerned, and their power exhausted.

6. That, in whatever aspect this case is viewed and considered, the law of Massachusetts cannot be drawn into doubt by the severest scrutiny; nor can the power of the United States be made to reach or control it without a manifest invasion of the rights reserved to the State by the terms of the constitution.

The counsel then closed his remarks by adverting to the importance which the question had acquired by being long a subject of earnest controversy and agitation. Many prosecutions were now pending, and, the public being anxious to be relieved from this state of suspense, he hoped the matter would be brought to a speedy and final issue. What that issue would be, it did not become him to anticipate; but he would venture to give assurance that the people of Massachusetts would acquiesce in it, and give their support to the law as expounded by this tribunal, to which they looked at all times with the deference and respect due to those who settle the greatest of all questions, the boundaries of power.

Mr. Webster, in reply, said that he agreed with the learned counsel who had just concluded his argument in many of the positions which he laid down. It was true that the retail trade should be regulated, and that intemperance was a great evil. Even if he differed from the State on the policy of these laws, he claimed neither for himself nor the court a power to review her decision upon that point. The State was the sole and uncontrolled judge of her policy. But the question here was one of authority, and not policy. Has Massachusetts the power to pass such laws? Whether she has or not, it is useless to inquire into her motives for passing them. It is admitted by all, that the United States have power to regulate commerce; and it is also admitted by all, that the States have certain police powers. So far, there is no difference of opinion. But the learned counsel says that these powers stand upon equal ground, both resting on sovereignty; and his inference is, that, in case of conflict, one has as much right to stand as the other. Here our difference of opinion commences. We say that these powers do not stand upon equal elevation, but, if there be a conflict between them, the State law must yield; because the constitution says that acts of Congress, passed within the scope of the constitutional power of Congress, are the supreme law of the land. There can be no conflict. The State law must recede. It has been so settled by this court. In 3 Wheat. 209, 210, it is so laid down, in the very terms which I use. Let us see, therefore, whether both laws, that is to say, the State law and the acts of Congress, can stand. What are they?

The former laws of Massachusetts made it obligatory to grant

licenses. The phrase was "authorized and directed" to grant, &c. But under the act of 1837 they may be withheld altogether, and the fact is, that for some years past none have been granted. Now there is no difference, in substance, between an absolute prohibition of licenses by law, and a grant of power to another body to withhold them. In both cases, the same result is produced by the action of the same authority, namely, the State. What is this result? It is, that no person can sell liquor in a less quantity than twenty-eight gallons.

What are the laws of Congress? They are, that brandy can be imported in casks of fifteen gallons. 4 Statutes at Large, 235; ibid. 373.

What is the right of the importer after complying with these laws? Does the right to sell follow the right to import? This court has already answered the question. In 12 Wheat. 433, it is said, — "There is no difference between the power to prohibit sales and the power to prohibit importation. None would be imported if it could not be sold." There is no exemption, by the law of Massachusetts, in favor of the importer himself. He cannot sell without a license. All are included within the law. It was said by the counsel on the other side, that the United States have not complained of any infringement upon their authority. But this makes no difference. Cases are always brought here by individuals who complain of a violation of their rights. It was also said, that Congress was bound to preserve and enforce the observance of moral duties. But if Congress does not prohibit a particular act, the inference is, that it does not think proper so to do. It remains to be shown that penalties are the best mode of enforcing temperance. Father Matthew does not think so. The States may pursue this policy if they choose, provided they do not interfere with vested rights. There are two things which Massachusetts has not done, both of which it may be wished that she had: —

1. She has not presented a memorial to Congress to prohibit the importation of liquor in small quantities.

2. She has not prohibited the domestic distillation of spirits. In 1840, five millions of gallons were distilled within her limits. Of this we do not complain. But if she has a right to pass the law now under consideration, she has also a right to exempt domestic distilled spirits from its operation. What, then, will be the condition of things? It will be, that her restrictions will be placed exclusively upon that article which Congress have said shall be subject to no restriction.

JOEL FLETCHER, PLAINTIFF IN ERROR, *v.* THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, DEFENDANT IN ERROR.

This case was very similar to the preceding one. The principal difference was in the admission of the fact, that the brandy, for the sale of which the plaintiff in error was indicted, was duly imported into the United States, the duty upon it paid, and that it was purchased by Fletcher from the original importer.

The following admission of facts was filed in the cause : —

"It is admitted, in the above case, that the liquors alleged in said indictment to have been sold by the defendant, in violation of the act of this State, entitled, 'An act enabling town councils to grant licenses for the retailing strong liquors, and for other purposes,' was brandy, the growth, produce, and manufacture of the kingdom of France ; which said brandy was duly imported into the United States at the port of Boston, in the district of Massachusetts, for the purpose of sale in the markets of the United States, and the duties levied thereon by virtue of the act of Congress of the United States, approved the 30th day of August, A. D. 1842, entitled, 'An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes,' were duly paid to the collector of the said port of Boston ; that said defendant bought said brandy of the importer thereof for the purpose of sale ; and, in pursuance of said purpose, did, at the times alleged in said indictment, sell the same, at said Cumberland, without license first had and obtained from the town council of the town of Cumberland.

"It is further agreed that the town council of said town of Cumberland have refused to grant any license for the year ensuing the Thursday next following the first Wednesday in April, A. D. 1845, for retailing strong liquors in any quantities, having been instructed by the electors of said town, in town meeting assembled, not to grant any licenses for the purpose aforesaid."

It is not necessary to recite the whole of the laws of the State, as they were very similar to those of Massachusetts. The following one will be sufficient : —

"An Act in Addition to an Act, entitled, 'An Act enabling the Town Councils to grant Licenses, and for other Purposes.'

"It is enacted by the General Assembly as follows : —

"Section 1. No licenses shall be granted for the retailing of wines or strong liquors in any town or city in this State, when the electors in such town or city, qualified to vote for general officers, shall, at the annual town or ward meetings held for the election of town or city officers, decide that no such licenses for retailing as aforesaid shall be granted for that year."

Fletcher was indicted upon two counts. The first was for selling strong liquor, to wit, rum, gin, and brandy, by retail, in a less quantity than ten gallons, without license; and the second, for selling, and suffering to be sold, in his possessions, ale, wine, and other strong liquors, by retail, &c., &c.

Upon this indictment he was convicted, and the case brought from the Supreme Court of Rhode Island to this court. The assignment of errors by the counsel of Fletcher was as follows: —

Assignment of Errors.

"United States of America, Supreme Court: — Joel Fletcher, Plaintiff in error, *v.* State of Rhode Island and Providence Plantations, Defendant in error.

"On a judgment of the Supreme Court, begun and holden at Providence, within and for the county of Providence and State of Rhode Island and Providence Plantations, on the third Monday of September, in the year of our Lord one thousand eight hundred and forty-five, wherein the said State of Rhode Island and Providence Plantations, by Joseph M. Blake, Attorney-General of said State, is prosecutor, and the said Joel Fletcher is defendant, the said Joel Fletcher, upon a writ of error upon said judgment, returnable to the next term of the Supreme Court for the United States, to be begun and holden at the city of Washington, in the District of Columbia, on the first Monday of December, in the year of our Lord one thousand eight hundred and forty-five, assigns for error in the records of process and judgment aforesaid, founded on certain statutes of the said State of Rhode Island and Providence Plantations, and the construction thereof by the said Supreme Court, the following, to wit: — That the judgment rendered in the Supreme Court of said State in this case, it being the highest court of law and equity of the said State in which a decision could be had in said case, should be reversed, for the reasons following, viz.: — That the act of the General Assembly of said State of Rhode Island and Providence Plantations, entitled, 'An act enabling town councils to grant licenses for retailing strong liquors, and for other purposes,' and the act entitled, 'An act in addition to an act, entitled, An act enabling town councils to grant licenses for retailing strong liquors, and for other purposes,' and appended hereto and set out as a part of the record in the said cause upon which said judgment was founded, and also the opinion and judgment of said Supreme Court of said State of Rhode Island and Providence Plantations, in the application and construction of said acts to the proof submitted in said cause, are void, the same being repugnant to that clause of the eighth section of the constitution of the United States which provides, — 'That the Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general

welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States'; and are also repugnant to that clause of the said eighth section of said constitution which provides as follows: — 'The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes'; and are also repugnant to that clause of the tenth section of said constitution of the United States which provides as follows: — 'No State shall, without the consent of Congress, lay any imposts or duties on imports and exports except what may be absolutely necessary for executing its inspection laws,' and the acts of Congress, in pursuance of the aforesaid several clauses of said constitution of the United States now existing in full force, which objections were, at the trial of said cause before said court, taken by the said Fletcher in his defence, and were overruled by said court. There is error also in this, to wit, that, by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid given, was given for the said State of Rhode Island and Providence Plantations against the said Joel Fletcher; whereas, by the law of the land, the said judgment ought to have been given for the said Fletcher against the said State; and the said Joel Fletcher prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings, and the matters herein set forth, may be reversed, annulled, and held for nothing, and that he may be restored to all things which he has lost by occasion of said judgment.

JOEL FLETCHER,
By JOHN WHIPPLE, and
SAMUEL AMES,
His Attorneys."

The cause was argued by *Mr. Ames* and *Mr. Whipple*, for the plaintiff in error, and *Mr. R. W. Greene*, for the State.

Ames and *Whipple*, for the plaintiff in error, read and commented on the various acts of the General Assembly of the State of Rhode Island, in relation to the licensing of taverns, ale-houses, and the like, and the sale of spirituous liquors therein, commencing in the year 1647, and coming down to the year 1824, for the purpose of showing, that, from the earliest period in the history of the Colony to the last-named period in the history of the State of Rhode Island, her policy had been uniform on this subject, and similar to that of most Christian and civilized countries, and of all the Colonies and States of the Union, — that is, to license and regulate the sale of spirituous liquors, that it might be consistent with the preservation of good order, and with the Christian virtue of temperance, and not to inhibit it, in enforcement of the Mahometan rule of abstinence. They showed that the licenses granted by the municipal authorities of the various towns of Rhode

Island for the keeping of taverns and the retailing of strong liquors had been a source of revenue to the towns and to the State, to aid in the maintenance of the police of the State; and insisted, that, in the fair construction of the acts empowering the town officers to grant them, the words "*may* grant" were legally construed "*must* or *shall* grant," according to the well-known general rule of so construing the word "may," when used in a public act or municipal charter to impart an authority to public officers, in the exercise of which the public interest or private rights were concerned; and that the practice of the authorities of the towns of Rhode Island had always concurred with this well-known rule of legal construction. To this point they cited, Backwell's case, 1 Vernon, 152; Rex *v.* Barlow, 2 Salk. 609; S. C., Carthew, 293, 294; King *v.* Inhabitants of Derby, Skinner, 370; Magdalen College case, 3 Atk. 166; King *v.* Mayor and Jurats of Hastings, 1 Dowl. & Ryl. 149; Newburgh Turnp. Co. *v.* Miller, 5 Johns. C. R. 101, 113, 114; Ex parte Simonton, 9 Porter's Ala. R. 390.

They then showed, that, under the influence of what is called the temperance reform, a new principle had been introduced into the legislation of Rhode Island on this subject, which, after numerous fluctuations, had, in January, 1845, settled the law, if indeed it was settled, in the shape of the act of January, 1845, which in substance forbids in any town the sale of all strong liquors in less quantities than ten gallons, without license first had from the town council of the town, and provides, that if, on the day appointed for the election of town officers, a majority of the electors of a town voting on the subject shall vote to grant, or not to grant, licenses for the ensuing municipal year, the town council of the town were irrevocably bound during the year to obey the instruction.

They admitted that a law regulating the sale of strong liquors under a license for the sale, even though a bonus was required for the license, was valid; but that a law like the present, in its purpose, end, and operation, as well as in its form, substantially and practically prohibitory of the sale, was, in its application to the case at bar, — in which the liquor sold was brandy imported from France, upon which, under the act of Congress of 1842, entitled, "An Act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," the duties had been regularly levied and paid, — void, as repugnant to that act, both as a revenue measure upon which the expenditures of the government of the United States were based, and as a regulation of the commerce of the United States with France.

Though they maintained the exclusive power of Congress, under the constitution, to regulate commerce with foreign nations, as well as among the States and with the Indian tribes, — as required by the necessities of the country at the time of its formation and adoption

as new, — to preserve proper commercial relations abroad, and for the prosperity and peace of the several States, as well as that an adequate revenue might be derived from duties on imports, they waived the discussion of the exclusiveness of this power as an abstract power in Congress, in the present case, for a double reason: — because Congress had exercised it in the subsisting act of 1842, and because the act of Rhode Island could in no proper sense be said to be an exercise of the power to regulate foreign commerce.

They admitted that an act of a State, to come in conflict with the exclusive power of Congress to regulate foreign commerce, when not exercised, must of itself be an exercise of that power; but maintained, that any law pertaining to the mere police of a State might come in conflict with a commercial regulation of Congress; and, if it did, must, so far as it did, yield to the law of Congress, as the supreme law of the land, when passed in pursuance of the constitution. They were not aware, until the doctrine had been boldly advanced by the counsel for Massachusetts, in the preceding case, — tried with this by order of the court, — that it had been "a growing opinion," and still less, that by the decision of this court in New York *v.* Miln, 11 Peters, 139, 141, it had become "the settled law" of this court and of the land, that in all such cases of conflict the rule of the constitution was reversed, and that the law of Congress became subject to the law of the State, as to the supreme law of the land, and that the clause of the constitution asserting the supremacy of the constitution, and of the laws and treaties of the United States made under it, applied only to the case of concurrent powers; nor did they so understand that case. They maintained that the doctrine thus announced was little short of absurdity, since it admitted the supremacy of the law of Congress in the case of concurrent powers, — in the exercise of which the governments of the States and the government of the United States enjoyed, as it were, a joint empire, and where, from the very fact that the powers were concurrent, they could never, in a constitutional sense, be said to conflict, and so there was no room for the supremacy in question, — and denied the supremacy of the United States in the legitimate exercise of its exclusive powers, making the United States the slave of the States in its own exclusive dominions, under a constitution which declared, without limitation or reserve, that its just power should be supreme, not only over the laws, but even the constitutions, of the States. Upon this question they appealed from conservative Massachusetts to democratic Virginia, and cited the 44th Paper of the Federalist, p. 183, Gideon's edition, in which Mr. Madison, in commenting upon the clause of the constitution in question, concludes his defence against the only objection that was made to it — that it rendered the constitution, laws, and treaties of the United States supreme over the constitutions of the States — with this statement of the re-

sult if this supremacy had not been given: — "In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members." In this case, a supremacy over the constitution, laws, and treaties of the United States was claimed for every, even the most petty, police law of a State, or even a town or city, when that constitution and those laws and treaties were made supreme over the constitution of the State by which, or under the authority of which, the police law was passed. They commented upon the case of New York *v.* Miln, for the purpose of showing that the general language there used by Mr. Justice Barbour in delivering the opinion of the court, from which the strange doctrine in question had been inferred, should, according to the rule in this respect laid down by Mr. Chief Justice Marshall in Cohens *v.* Virginia, 6 Wheat. 399, be restrained to the case before the court, which, by the decision of the court, involved no conflict of the powers of the government of the State of New York with those of the government of the United States, and, by the illustrations given of the meaning of the language, could be fairly applied only to cases where no conflict existed. Upon this point, they cited also the opinions of Mr. Chief Justice Taney, and of Mr. Justice McLean, in the subsequent case of Groves et al. *v.* Slaughter, 15 Peters, 505, 509, members of the court at the time the opinion in New York *v.* Miln was delivered, and concurring in that opinion, for the purpose of showing that they could not have understood the language in question in the sense contended for.

(Mr. Justice Wayne here declared his entire dissent from the general opinions expressed in the language in question, and even declared that he had no recollection that such language was in the opinion of the court in that case at the time it received his concurrence.)

They concluded upon this point, that if any persons really held the doctrine in question, upon the supposition that it was necessary for the maintenance of certain peculiar institutions of some of the States, which, though guaranteed by the constitution, were at war with its whole spirit, as well as with the principles of the Declaration of Independence, which the constitution carried out as far as it could consistently with the existing condition of the country, they were guilty of "a blunder," — in the opinion of a great but unprincipled politician, in such matters, always worse than "a crime." The clauses in the constitution guaranteeing these institutions were an anomaly in it. It was better, then, to treat those institutions and every thing fairly relating to them as anomalous, — to be governed by peculiar rules, — than, by converting an anomaly into a general rule, to

pervert the whole spirit, and invert the whole order, of the constitution, and, by thus stripping the general government of all its powers, deprive the States, and especially the smaller States, of all the rights and protection guaranteed by the United States. They who were willing, and all sensible people were, to stand by the compromises of the constitution, would do much to redeem the pledge thus given for them; but it was both unjust and impolitic to require this of them.

They came, then, to the only real question in the cause, whether the law of Rhode Island in question was in conflict with the tariff law, as it was called, of 1842.

The act of Congress admits brandy by name to sale and consumption in the States, at one dollar per gallon, both for revenue and as a regulation of commerce with France; and they cited The Federalist, Pap. 12, p. 46, to show that no inconsiderable revenue was originally anticipated from spirits.

Congress might have prohibited the importation of brandy, as it did in the same act the importation of obscene prints, &c.; but it licensed the importation, and, by necessary intendment, the sale and consumption, of brandy by the above act, as the United States did, by the treaty of July 4, 1831, with France, the admission of wines at certain rates "to consumption into the States." Right or wrong, Congress had said, by the act in question, to the foreign producer, to the importer, retailer, consumer, pay us one dollar per gallon, and you shall have brandy from France for sale and consumption. Upon this offer all parties had acted, produced, imported, bought of the importer, and in the price of the article had paid the duty; and after this it was something worse than illusory, that we should be told that the importation only was licensed, or at most the sale in the original package or cask, and that the States might destroy the whole value of the import by prohibiting its sale and consumption, and thus effectually countervail the legislation of Congress in one form, which it was agreed they could not do in another. This would be to make the constitution deal in mere forms and names, and not in things.

The law of Rhode Island proceeds upon this formal distinction. It says to Congress, you may license the importation of brandy, but not a drop of it shall be sold or consumed in any town of ours, if the voters of the town choose to prohibit it. You may expect revenue from it; but so far as our citizens are concerned, not a penny shall they pay. We forbid it by law.

The law in question is most skilfully devised to effect its purpose. It does not in form prohibit altogether the sale and consumption of foreign brandy, but only really and substantially. It says, you shall not sell in less quantities than ten gallons, and might as well have said in less quantities than twenty-eight gallons, or one hundred gallons, or one thousand gallons. It cuts off, strikes out, one link be-

tween the importer and consumer, and might as well destroy, and does thus practically destroy, the whole chain; for there can be no importation without sale, no wholesale without retail,—and these are arbitrary terms,—no retail without consumption.

In case of a direct prohibition of sale like this there can be no metaphysical subtilty necessary to ascertain the degree of conflict between the State law and the law of Congress; whether it amounts to "a possible or potential inconvenience," or "an extreme inconvenience," or "a direct repugnancy," or "plain incompatibility." Incidental diminution of consumption from licenses, taxation, charters of temperance societies, prohibitions of sales to drunkards, children, slaves, &c., is another thing. Here the prohibition is both direct and substantial. To prohibit and prevent the sale of the imported article is both the purpose and effect of the law; and upon the ground that, by the act of 1842, Congress had licensed what was wrong.

The very test proposed by this court in New York v. Miln, 11 Peters, 143, is thus met precisely by the law in question.

It is said that the sale of liquor is immoral. Then let Congress prohibit, not seek a revenue from its importation. Let reform in this respect begin constitutionally with Congress; for in no cause, however sacred, can a State be said to act rightly, when acting unconstitutionally.

In application to any other article of commerce between the United States and foreign countries, or between the States, but liquor, it would be admitted that such a law was void,—as to rice, sugar, cotton, tobacco, flour, cotton goods, French silks, woollen cloths, &c. What is the ground for distinction? It is as much within the police power of a State to pass laws to encourage or compel household manufactures, or the raising of certain agricultural products, by forbidding the sale of cotton, woollen, or silk fabrics, in less quantities than ten, or twenty, or one hundred pieces,—or of cotton, rice, flour, tobacco, by forbidding the sale of these articles in less quantities than ten, twenty, or one hundred bales, casks, bundles, or barrels,—as to prevent the use of imported liquor, by forbidding the sale in less quantities than ten, twenty, or one hundred gallons; and yet all will agree that a law like that supposed would be clearly void, in its application to such articles imported from foreign countries, or another State. Let some casuist mark the difference between the cases if he can.

The law in question is no more entitled to be called "a police law" than the law supposed, if there was any thing in such a mere name. Any law relating to the internal government or police of a State or city is a police law, whether civil or criminal, and it would be absurd to contend, that constitutionally one police law was more sacred than another; since the State or city is the sole judge of the necessity or fitness of either, provided always, that in passing such

laws it does not interfere with those constitutions or laws which control its powers of legislation.

They contended that the fact, that the sale in the case at bar was not of the article in the cask in which it was imported, could not affect the question; the notion suggested *obiter*, not adopted, by Mr. Chief Justice Marshall, in Brown *v.* Maryland, that the importation licenses the sale only in the original package, being false in theory, and destructive to the constitutional powers of Congress in practice. As the governments of the United States and of the States operate upon the same men and things, within the same territory, at the same time, it is obvious that all material barriers between them are broken down, and that in general we must look for the boundary line of the two jurisdictions in the relation and condition of the men and things upon which they operate. This is certainly true of the power to tax imports, or things which have been imported, and of the prohibition to tax exports, or things to be exported. It is obvious, that the States may and do every day tax residents for their personal property, whether in the form in which it has been imported, and even lying in the custom-house, or in which it is to be exported, on the wharf, or in the vessel, just as if the import or export was confused with the mass of property in the State; and no one deems such a tax as a tax upon imports or exports, in the sense of the prohibition of the constitution, or in any proper sense whatever. Nor would such a general exercise of the taxing power by the United States upon all personal property of its citizens, including imports and exports, be a tax or duty upon imports or exports, but merely a tax upon personal property, and upon the import or export as such property. Any discriminating tax, however, upon a thing imported, as such, at any time, in any form, either of the law or the import, would certainly be a tax or duty upon imports forbidden to the States; and any discriminating tax or duty upon a thing to be exported, as such, would be a duty upon exports forbidden to the United States, and to the States, except under the control of Congress, for the purpose of executing their inspection laws. There is nothing in the nature or form of an article which makes it an import, only something in its history; there is nothing in the nature or form of an article which makes it an export, only something in its destination; and if any thing be specifically taxed as imported, or to be exported, it is a tax upon an import, or upon an export, within the letter and spirit of the constitution. Once allow that the States may levy discriminating duties upon things imported from foreign countries, or other States, the moment they have lost their original form, or have been taken out, as they must be for sale and use, of the package or cask, and the commercial power of Congress, and the revenues of the United States from this source, are lost together. Once allow that the United States may levy discriminating duties upon things to be

exported from the States, as such, in any form or package, or in the process of growth or manufacture, and it is obvious that the agriculture and manufactures of the States are directly at the mercy of the general government. This "package notion," as it is called, is one of those vain but natural efforts of the mind to attach itself to something material to rest upon, even in matters which do not admit of such helps and rests.

The taxing power is a sovereign power, necessary for the support of government, and never in its nature or effect treated as a repugnant power. Providence Bank *v.* Billings, 4 Peters, 514; Groves *v.* Slaughter, 15 Peters, 505. When exerted by the State over personal property in general, including imports, it cannot affect foreign commerce, or the revenues of the United States, since it bears equally upon all articles, and thus keeps their relative value the same. To become mischievous, either constitutionally or practically, to foreign commerce, a tax law must discriminate as to the subjects of it.

This, however, is not true of prohibitory laws, like the law in question. If practically such a law forbids the sale, destroys the vendible character of an imported article, which constitutionally it cannot do, it does not help the law in relation to such articles, that it also destroys the vendible character of the like article manufactured in the State, which constitutionally it may do. It is void *pro tanto* imports, in any form or shape.

There is also this plain distinction between such a law and an ordinary license law: that the latter does not, like the former, destroy the vendible character of the article, but, admitting this, restricts the power of sale to certain selected persons licensed to sell the article; and practically the difference is just as great as the different terms *license* and *prohibition* import.

No one denies the right of the States to regulate the sale or punish the improper use of any article, domestic or imported, within their territories, under such customary and proper restrictions as substantially leaves to the article its vendible character. It is the taking away of this character from imported brandy, upon which the duties have been levied and paid, of which we complain in this case.

Thus, the States may and do prohibit sales of all articles on the Lord's day, in enforcement of a divine command; of liquor to drunkards, children, &c., to prevent riot and intemperance; and they tax and license hawkers and peddlers, and auctioneers of all articles, and retailers of things dangerous in their use, to prevent fraud, regulate domestic trade, raise revenue, and insure public safety and social order. All this, so far from injuriously affecting the sale of things, aids and assists it, by making it safe, regular, profitable, and consistent with the well-being of the community. The same remark applies to quarantine laws, and sanitary regula-

tions in general. They may delay the infected ship, or stop the infected person, or even destroy the infected article; yet who does not see that in this very way they aid foreign commerce, by making it safe to the community which carries it on, and promote traffic in imports, by preventing all danger in handling, using, or consuming them? Even these, however, may be so needlessly restrictive, or, still worse, totally prohibitory in their character, as obnoxiously to interfere with foreign commerce, and in such case would merit no more favor, on account of the professed purpose of the law, than if avowedly passed to prevent foreign commerce in certain articles, or to prevent it altogether.

The point where regulation ends and prohibition commences may in some cases be difficult to determine, as many practical questions are. The cases must be decided as they arise, and, as Mr. Chief Justice Marshall suggests in Brown v. Maryland, experience will assist and develop the true tests of decision.

It is sufficient that in the case at bar there is no such difficulty, the design, end, and effect of the law in question being to prohibit the sale of an article made vendible in the States by a law of Congress.

The law is deemed more objectionable because in effect it prohibits the sale of the same article in some towns in the State, and licenses it in others; thus making the law of Congress operate unequally within the territory of the same State.

Finally, the record shows that the only proof against the plaintiff in error was of the sale of brandy imported into Boston, upon which the duties had been duly levied and paid. He was willing to take a license and to pay for it, or to sell his import through any person who was licensed to sell it; but the law forbade all sale in any practicable shape in the town in which he lived, in derogation of the right of sale attached to an article imported under the laws of the United States. In its application to his case the law is void, inasmuch as it derogates from a right secured to him by a law of Congress.

Mr. R. W. Greene, for the State.

The law of Rhode Island is strictly a police law, having for its object the suppression of drunkenness. It was not intended to carry out any object of commercial policy. It was not intended to secure to the citizens of Rhode Island, within her own territory or elsewhere, any advantages of commerce or manufactures beyond what are enjoyed by the citizens of all the other States. It was not intended to countervail any commercial policy of the federal government.

It is a law intended to aid in the accomplishment of a great moral reform, and indispensable to its success. The federal government have adopted similar views with the General Assembly

of Rhode Island, in a case coming within the sphere of their constitutional power. An act of Congress authorizes the substitution of tea and coffee for the spirit rations both in the army and navy.

I shall endeavour to show that the Rhode Island law does not present a case of conflict, upon any sound construction of the constitution. What are the provisions of the Rhode Island law? It allows importation, and sale by the importer, and every body else, in bulk, as imported. It goes further, it allows a retail trade to the importer and every body else in the article after bulk broken, and that as low as ten gallons. It goes still further, and vests in the towns a discretionary power to decide at their April town meetings, whether they will grant licenses to sell in quantities under ten gallons for the coming year. The inhabitants of the towns are most interested in the decision, and most able to decide right. Not by caprice, but by sober and enlightened judgment. There is a propriety in leaving the decision to the towns.

An objection to the law is, that practically, it is said, the prohibition of sales under ten gallons is a total prohibition. The object in fixing this amount was to prevent sale by the glass.

It is said by the counsel for the plaintiff in error, that this law is prohibitory. But it is not necessarily so, nor probably so. Discretion implies not only the power to decide either way, but the probability of such decisions. If all the towns had been opposed to granting licenses, then the General Assembly would have passed a general prohibitory law.

It is agreed, that, if a conflict results from the practical operation of a law, it must be decided as if such conflict had been intended by the legislature. But the necessary effect must be to conflict, and not the possible, or even the probable effect.

There is no evidence before the court that every town in the State, except Cumberland, has not granted licenses, which are now in full effect. And yet the court is called upon to pronounce this law unconstitutional, upon the ground of this possible prohibition, when the prohibition may not exist in any town in the State, except Cumberland. The power vested in the towns under this law is the same as that vested in the town councils under previous laws. A power to grant licenses is a political power in town councils, and not at all analogous to the cases cited by the counsel for the plaintiff in error. Those were cases of private right, where a mandamus would go to enforce it. Would such a proceeding lie against a town council by a party to whom a license had been refused? But erase from the statute the entire provision vesting any power in the towns to grant licenses, and leave the prohibition upon all sales under ten gallons absolute. This would not be a case of conflict, because it allows of sales at retail as low as ten gallons.

It is admitted that States have a right to pass license laws. All

had license laws when the constitution was adopted; no change took place. What is a license law but a prohibition upon every body else, except the party licensed? The difference between a license law and the Rhode Island law is in the degree of prohibition, not the principle. Both are prohibitory; the Rhode Island law may become and probably would become more prohibitory than an ordinary license law. Does this difference render the one law void, when the other is valid? How much more prohibitory must a law be than an ordinary license law, in order to render it void?

What rule or principle can the court adopt in relation to such a subject? How much must be the restriction upon sales, after the article is broken up, and out of the hands of the importer, in order to render the law void? What means has the court to ascertain the practical effect of restrictions? And yet it is said the effect is to determine the law.

All license laws, like the law under consideration, diminish importations and revenue by checking sales. Their object, like the object of the Rhode Island law, is to prevent drunkenness. In other words, to prevent consumption. The check upon importation, and the diminution of the public revenue, is a consequence of both laws, but not their object.

If we were to compare the amount of sales, there being no regulation by license, and the amount of sales under a well-guarded license law, it would be very great, undoubtedly; but no one can ascertain it with any accuracy, — certainly this court cannot. A plain case of conflict must be proved.

This court, in the exercise of its high authority, has always acted upon this subject with caution. It has always required a plain case of unconstitutionality to be made out.

The plaintiff in error says, the question of conflict is a question of fact; but it is not shown that any town, except Cumberland, has refused to grant licenses.

Again; to render a license law valid, how many licenses must it provide for? One in each town, or how many, or one in each county? All license laws materially check importation, by diminishing consumption. What degree of check and restriction will render the law void, on the ground of conflict? Suppose the Rhode Island law prohibited sales as low as five gallons, or one gallon, or a quart; what principle will the court adopt?

License laws were in force in all the States at the time of the adoption of the constitution. No alteration of these laws has been made by the States, and they have never been, and are not now, complained of by the federal government. This shows that, by the understanding of all the parties to that instrument, these laws do not interfere with any of the powers of the federal government.

The true rule as to conflict is, not a partial check upon sales, or a partial diminution of the revenue. This involves the inquiry, how

much check, how much diminution? Conflict is a prohibition of all sales. It is said the importation and payment of duties imply the right to sell, that the retail sale is indispensable to give value to the wholesale trade, and therefore a prohibition of the retail sale is void. Payment of duties gives no greater right than importation of a free article, tea or coffee.

But a license law prohibits the retail sale to every body but the party licensed, and this is agreed to be valid. The fact of prohibition, therefore, does not render the law void, but the extent of it. What must that extent be? How can the court ascertain the effect upon sales and importations, except the effect which is a necessary consequence of the law? or, in other words, how can they judge, except of an absolute prohibition of all sales? What means have they to ascertain the difference between the practical effects of one law and another, both being prohibitory, but prohibitory in different degrees?

In Brown v. State of Maryland, the true rule is laid down. When an import has been broken up, or has passed from the hands of the importer, it ceases to be an import. It has then passed into the mass of property of the State, and is subject to its authority for purposes of police, internal trade, and taxation.

Unless this be so, Congress may prescribe the police regulations of the States. They may prescribe the extent to which a restrictive regulation may be carried, in order to be constitutional.

We cannot overrate the importance of police powers to the States. The means of social improvement, the success of all institutions of learning and religion, depend on the preservation of this power. We look to the States for the exercise of their authority in aid of all institutions which tend to improve and elevate the moral and intellectual character of the people.

The doctrine of conflict must be expounded with reference to the principle of compromise on which the constitution is founded.

Congress may authorize the importation of an article which is very injurious to the health or morals of a State. The importer may perhaps sell in bulk; then the power of Congress is exhausted, and the power of the State begins. Upon such sale the property is mingled with the mass of the other property of the State, and subject to the State power, either to tax, to prohibit, or regulate, as its purpose of police or internal trade may require.

What does the internal trade consist in? In its own products, products of other States, and products of foreign nations. If the doctrine is true with regard to foreign products, it is equally so with regard to products of other States. Then the State power over the property of its own citizens, within its own territory, is limited to products of its own. There will be two kinds of property; one subject to the power of the State, and the other exempt from it.

Unless this be done, it is said the policy of Congress may be countervailed. We answer this by saying that, on the other hand, the police power of the States and the power over internal trade will be destroyed. It is not to be supposed that the States will countervail the policy of Congress merely to countervail it. The compromise of the constitution goes upon a different principle, and at all events the limit of the power of Congress cannot be exceeded in order more effectually to carry out its own policy. If this were a consolidated government, the difficulty would not exist. But it is a confederation of States, external relations are confided to federal government, whilst all domestic relations belong to the States. External policy may be affected by regulations of internal trade or police of the States. This results from the confederacy. Foreign commerce must be affected by internal commerce. Property becomes the subject of internal commerce when it has become incorporated with the mass of the property of the State. Regulations of internal commerce may affect foreign commerce, and foreign commerce may affect internal commerce. Both are valid, nevertheless. Regulations of internal trade may check importation of foreign goods, and the introduction of foreign goods may affect the internal trade and policy of the State. If both governments keep within their constitutional limits, there can be no collision or conflict. The laws of one may affect the operation of the laws of the other. Thus, the police laws of the States in restraining and partially prohibiting the sale of spirituous liquors may affect the operation of the act of Congress under which they are admitted. But this is no conflict. On the other hand, the act of Congress admitting spirituous liquors may countervail the policy of the States. But still there is no conflict. A case of conflict must arise from one government or the other exceeding its limits, and then the law of that government must yield which has exceeded its authority, whether federal or State. The provision of the constitution as to its supremacy, and the laws passed under it, is confined to laws passed in conformity to its powers.

ANDREW PEIRCE, JUNIOR, AND THOMAS W. PEIRCE, PLAINTIFFS IN ERROR, *v.* THE STATE OF NEW HAMPSHIRE.

THIS case originated in the Court of Common Pleas for the county of Strafford, and was carried to the Superior Court of Judicature for the First Judicial District of New Hampshire. The plaintiffs in error were indicted for that they did unlawfully, knowingly, wilfully, and without license therefor from the selectmen of said Dover, the same being the town where the defendants then resided, sell to one Aaron Sias one barrel of gin, at and for the price of $ 11.85, contrary to the form of the statute, &c.

The counsel for the State introduced evidence to prove the sale of the gin, as set forth in the indictment; and it was proved, and admitted by the defendants, that they sold to said Aaron Sias, on the day alleged in the indictment, one barrel of American gin, for the price of $11.85, and took from said Sias his promissory note, including that sum. It appeared that it was part of the regular business of the defendants to sell ardent spirits in large quantities.

To sustain the prosecution, the counsel for the State relied on the statute of July 4, 1838, which is in these words, viz. : —

"An Act regulating the Sale of Wine and Spirituous Liquors.

"Sect. 1. Be it enacted by the Senate and House of Representatives in General Court convened, That if any person shall, without license from the selectmen of the town or place where such person resides, sell any wine, rum, gin, brandy, or other spirits, in any quantity, or shall sell any mixed liquors, part of which are spirituous, such person, so offending, for each and every such offence, on conviction thereof, upon an indictment in the county wherein the offence may be committed, shall forfeit and pay a sum not exceeding fifty dollars, nor less than twenty-five dollars, for the use of such county.

"Sect. 2. And be it further enacted, that the third section of an act, passed July 7, 1827, entitled, 'An act regulating licensed houses,' and other acts or parts of acts inconsistent with the provisions of this act, be, and the same hereby are, repealed.

"Approved July 4, 1838."

The counsel for the defendants moved the court to instruct the jury, that if the law of 1838, under which the respondents were indicted, was constitutional, the sale here was contrary to law, and the note of Sias was void, and that such a payment by note was no payment, and therefore there was no sale. But the court refused so to instruct the jury, but directed them, that, on the supposition the defendants could not recover the contents of the note, they might notwithstanding have violated the statute. The defendants' counsel then introduced evidence that the barrel of gin was purchased by the defendants in Boston, in the Commonwealth of Massachusetts, brought coastwise to the landing at Piscataqua Bridge, and from thence to the defendants' store, in Dover, and afterwards sold to Sias in the same barrel and in the same condition in which it was purchased in Massachusetts. And the defendants' counsel contended that the aforesaid statute of July 4, 1838, was unconstitutional and void, because the same is in violation of ce tain public treaties of the United States with Holland, France, and other countries, containing stipulations for the admission of spirits into the United States, and because it is repugnant to the two following clauses in the constitution of the United States, viz. : —

"No State shall, without the consent of the Congress, lay any

imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

And the defendants' counsel contended that the jury were the judges of the law as well as the fact in the case; that it was their duty to judge of the constitutionality of the act of July 4, 1838, and to form their own opinion upon that question; and that the court were not to instruct the jury relative to questions of law, as in civil cases, but were merely to give advice to the jury in matters of law. The court instructed the jury, that the position that the jury were judges of the law as well as of the fact, as contended for by the defendants' counsel, was not correct, to the extent of the general terms in which it was stated; that the same rule existed in this respect in criminal cases which prevailed in civil cases; that it was the duty of the court to instruct the jury in relation to questions of law, and that the court was responsible for the correctness of the instructions given; and in case of conviction, if the instructions were wrong, the verdict might be set aside for that cause; but that the jury had the power to overrule the instructions of the court, and decide the law contrary to those instructions, through their power to give a general verdict of acquittal; and that if they did so, and acquitted the defendants, the court could not correct the matter if the jury had erred, because the defendants could not in such case be tried again; and that the circumstance, that the jury had thus the power to overrule the instructions of the court, in case of an acquittal, did not show that they had a right to judge of the law. The court further instructed the jury, that the statute of July 4, 1838, was not entirely void, if it might have an operation constitutionally in any case; and that, as far as this case was concerned, it could not be in violation of any treaty with any foregn power which had been referred to, permitting the introduction of foreign spirits into the United States, because the liquor in question here was proved to be American gin. The court further instructed the jury that this statute, as it regarded this case, was not repugnant to the clause in the constitution of the United States providing that no State shall, without the consent of Congress, lay any duty on imports or exports, because the gin in this case was not a foreign article, and was not imported into, but had been manufactured in, the United States. The court further instructed the jury, that this State could not regulate commerce between this and other States; that this State could not prohibit the introduction of articles from another State with such a view, nor prohibit a sale of them with such a purpose, but that, although the State could not make such laws with such views and for such purposes, she was not entirely forbidden to legislate in relation to articles introduced from foreign countries or from other States; that she might tax them the same

as other property, and might regulate the sale to some extent; that a State might pass health and police laws which would, to a certain extent, affect foreign commerce, and commerce between the States; and that this statute was a regulation of that character, and constitutional. And the court further said, in conclusion (the sale being admitted, and the instructions of the court that the law, as applicable to this case, was constitutional, having been given), that nothing farther remained in this particular case, unless the jury saw fit to exercise the power that they possessed of overruling the instructions of the court, and giving a verdict contrary to those instructions; and that if they did so, and acquitted the defendants, the court could not set aside the verdict, even if an error had been committed.

The jury having returned a verdict, that the defendants were guilty, the defendants excepted to the foregoing instructions, and to what is said in conclusion of the charge as aforesaid, and filed this bill; which was sealed and allowed.

JOEL PARKER.

This judgment having been affirmed by the Superior Court of Judicature, a writ of error brought the case up to this court.

It was argued at a prior term, by *Mr. Hale*, for the plaintiffs in error, and *Mr. Burke*, for the State, and held until now under a *curia advisare vult*.

Mr. Hale, for the plaintiffs in error.

As the questions relating to the several interrogatories which were propounded to the jurors, and those which the court below refused to have put to them, and the question whether, in criminal cases, the jury are judges of the law as well as the fact, and every other question raised in the bill of exceptions to the ruling of the judge who tried the case, save the single one of the constitutionality of the law of New Hampshire, entitled "An act regulating the sale of wine and spirituous liquors," passed July 4, 1838, belonged appropriately to the superior court of that State finally to adjudicate upon, and are not supposed in this case to appertain to the jurisdiction of this court, I shall pass them over entirely, and proceed at once to the consideration of the only question which this case presents to this tribunal for decision. That question is, — "Is the act of the legislature of New Hampshire, above mentioned, in accordance with, or in contravention of, the constitution of the United States?"

The plaintiffs in error contend that it is repugnant to that clause of the constitution of the United States which provides that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws"; also, because it is repugnant to that clause which declares that "the Congress shall have

power to regulate commerce with foreign nations, and among the several States and with the Indian tribes."

Believing that the whole ground covered by this case has been more than once considered by this court, fully and ably argued by eminent and distinguished counsel on both sides of the question, and so palpably and distinctly decided in divers cases, especially in Brown *v.* Maryland, 12 Wheat. 419, that it is not in the power of sophistry even to withdraw this law from that sphere of legislation which the decision in that case prohibited to the States, I trust I shall be considered as having fully discharged my duty to my clients, when I have briefly adverted to a very few of the many palpable reasons assigned by the court for the ground they then assumed, and which, it is confidently believed, will avail to the plaintiffs in error in the present case.

If this barrel of gin had been imported from a foreign country, could the State of New Hampshire have prohibited its introduction into their territory? The answer to this interrogatory is obvious and palpable. It will not for a moment be contended, that, while the constitution prohibits any State from laying any imposts or duties on imports or exports, the right is left to the several States to prohibit importations altogether. The power of regulating imports from foreign countries falls so directly and inevitably under the power to regulate commerce, that it has never been denied to belong to Congress. I shall proceed upon the assumption, that no one can controvert this plain proposition. If the State could not prohibit its importation from a foreign country, could the State prohibit its sale? Clearly not. Justice Story, in his Commentaries (vol. 2, § 1018), says:—"There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold."

Chief Justice Marshall (Brown *v.* Maryland, 12 Wheat. 446), says:—"If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point where its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress

has a right, not only to authorize importation, but to authorize the importer to sell."

Upon these authorities, I take it to be clear, that, if this barrel of gin had been imported from a foreign country, the State of New Hampshire neither could have prohibited its introduction into their territory, nor its sale while it remained in the situation in which it was imported.

The next question is, whether, it being an importation from a sister State instead of a foreign country, it is not equally protected by the constitution and laws of the Union; or, in other words, is commerce with foreign nations put on a better foundation by the constitution than commerce between the several States? There surely is nothing in the words of the constitution, nothing in the manner in which the constitution is expressed, to warrant such a position. The provisions applicable to both species of commerce are found in the same sentence, the one immediately following the other. But we are not left to conjecture on this subject. Chief Justice Marshall, in delivering the opinion of the court, in the case (Brown v. Maryland) before cited, says:—"It may be proper to add, that we suppose the principles laid down in this case to apply equally to importations from a sister State." Justice Story, in his Commentaries (vol. 2, § 1062), says:—"The importance of the power of regulating commerce among the States, for the purposes of the Union, is scarcely less than that of regulating it with sovereign States. The history of other nations furnishes the same admonition. In Switzerland, where the union is very slight, it has been found necessary to provide, that each canton shall be obliged to allow a passage to merchandise through its jurisdiction, without an augmentation of tolls. In Germany, it is a law of the empire, that the princes shall not lay tolls on customs or bridges, rivers or passages, without the consent of the emperor and Diet. But these regulations are but imperfectly obeyed, and great public mischiefs have followed. Indeed, without this power to regulate commerce among the States, the power of regulating foreign commerce would be incomplete and ineffectual. The very laws of the Union in regard to the latter, whether for revenue, for restriction, for retaliation, or for encouragement of domestic products or pursuits, might be evaded at pleasure, or rendered impotent. In short, in a practical view, it is impossible to separate the regulation of foreign commerce and domestic commerce among the States from each other. The same public policy applies to each; and not a reason can be assigned for confiding the power over the one, which does not conduce to establish the propriety of conceding the power over the other."

If these authorities can establish a position, then is an importation like the one in the case under consideration entitled to the same privileges and immunities, including, of course, the right to

sell, that would have belonged to it if it had been an importation from a foreign country.

This law of New Hampshire has sometimes been supposed to be saved from the operation of the constitutional principles, as laid down by the court in the case of Brown *v.* Maryland, by the decision in New York *v.* Miln, 11 Peters, 102. An attentive examination of that case, so far as any analogy is found to exist between that and the present, will furnish no foundation upon which to base any such conclusion. Instead of overruling the doctrines sanctioned by the court, in the cases of Gibbons *v.* Ogden, 9 Wheat. 1, and Brown *v.* Maryland, the court say, that the question involved in the case of New York *v.* Miln is not the very point decided in either of the cases above referred to; but, on the contrary, the prominent facts of that case were in striking contrast with those which characterized the case of Gibbons *v.* Ogden; nor, say the court, is there the least likeness between the facts of this case and those of Brown *v.* Maryland. And the reasons upon which the decision in the last-named case rests are repeated and reaffirmed in the case of New York *v.* Miln. The court, in stating the difference between the two cases, say: — "Now it is difficult to perceive what analogy there can be between a case where the right of the State was inquired into, in relation to a tax imposed upon the sale of imported goods, and one where, as in this case, the inquiry is as to its right over persons within its acknowledged jurisdiction; the goods are the subject of commerce, the persons are not. The court did, indeed, extend the power to regulate commerce, so as to protect the goods imported from a State tax after they were landed, and were yet in bulk; but why? Because they were the subjects of commerce, and because, as the power to regulate commerce, under which the importation was made, implied a right to sell, that right was complete, without paying the State for a second right to sell, whilst the bales or packages were in their original form. But how can this apply to persons? They are not the subject of commerce; and not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to Congress to regulate commerce, and the prohibition to the States from imposing a duty on imported goods." Keeping this palpable and most obvious distinction in view, and ascertaining what were the points raised and settled in the case of New York *v.* Miln, there is no danger of the mind being misled by any of the remarks of the court in delivering their opinion in that case. The State of New York passed a law, requiring the master of every vessel arriving in New York from any foreign port, or from a port of any of the States of the United States other than New York, under certain penalties, to make a report in writing, containing the names, ages, and last legal settlement of every person who shall have been on board the vessel commanded by him during the voyage. It was contended by the

defendant in that case, that "the act of the legislature of New York aforesaid assumes to regulate trade and commerce between the port of New York and foreign ports, and is unconstitutional and void."

The court decided that it was not a regulation of commerce; that persons were not a subject of commerce, and that it did not come within the principles settled in Gibbons v. Ogden, or Brown v. Maryland.

Nor can a distinction be found between this case and that of Brown v. Maryland, from the fact, that in Maryland the importer was compelled to pay fifty dollars for his license, and in New Hampshire it does not appear that he is compelled to pay any thing. Chief Justice Marshall, in stating that case, says:—"The cause depends entirely on the question, whether the legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State before he shall be permitted to sell a bale or package so imported."

To that inquiry the court by its decision gave a negative answer; and when they add, as the constitution most palpably authorized them to, that "the principles laid down in this case apply equally to importations from a sister State," it seems that they decided every principle involved in the case at bar, unless there be something peculiar in the subject-matter upon which the legislature of New Hampshire has legislated, viz. wine and spirituous liquor; upon which I propose to submit a few suggestions presently. The question was not as to the amount to be paid for the license, nor whether any thing was to be paid, but as to the right of the State to require it under any circumstances.

Now let us see what this act of the legislature of New Hampshire undertakes to do. It assumes that the State may prohibit, under severe penalties to every one within her limits, the entire commerce in wines and ardent spirits. No matter that we have treaties with foreign powers authorizing their importation and sale into the country; no matter that Congress have admitted them into the country under the general laws of the whole Union, and, to encourage the manufacture, have made such as are produced from certain specified substances entitled to debenture upon exportation; no matter that the government of this Union at this moment derives no inconsiderable portion of its revenue from the duties levied upon these proscribed articles of commerce; this act of New Hampshire subjects every individual who sells a barrel, hogshead, cargo, or any quantity, great or small, without a license from the selectmen of some one of her towns, to the ignominy and expense of a criminal prosecution, conviction, and fine or imprisonment.

Is there any thing in the nature of the object concerning which New Hampshire has legislated to constitute it an exception from these general provisions? It is worthy of notice, that a large proportion of the articles for the sale of which the laws of Maryland

required a license, and which laws this court pronounced unconstitutional, consisted of various kinds of distilled spirituous liquors; and it did not occur to the distinguished counsellors engaged in that case, that there was any thing in that circumstance to call for the application of a rule of construction different from what was applied to other subjects of commerce.

The court below, in the case at bar, admit that the State of New Hampshire cannot regulate commerce between that and the other States; that they cannot prohibit the introduction of articles from another State, with such a view, nor prohibit the sale of them for such a purpose; but that a State might pass health and police laws, which would, to a certain extent, affect foreign commerce, and commerce between the States; and that this statute was a regulation of that character, and constitutional.

The doctrine of the right of a State to pass health and police laws, carried to the extent here claimed, would be a virtual abrogation of the constitution, and a total nullification of that power in the general government to regulate commerce, which was one of the chief objects proposed to be attained by the establishment of the federal constitution. Let us test this principle by some subject other than wine and ardent spirits. Many philanthropists and physicians contend that the use of tobacco is as injurious as that of intoxicating drink. Will it for a moment be supposed that therefore a State, or any number of States, may prohibit the introduction of tobacco within their borders, and make the selling of it an indictable offence? May one or more of the wool-growing States of this Union, under the right to make health and police regulations, prohibit the introduction of cotton into their limits, and make him who would sell it a felon, and then escape the condemnation so justly due to such an unwarrantable assumption of power, on the ground that it was more healthful for their citizens to be clad in woollen than in cotton garments? Not a few reformers of the present day believe and affirm that the use of tea and coffee is, in all cases, injurious; and if such a sect should momentarily acquire the ascendency in any of the State legislatures, may they render commerce in those articles criminal?

Another sect of reformers, by no means despicable in point of numbers or talents, honestly believe, and strenuously assert, that the use of animal food is an evil which ought not to be tolerated; but may a State, a majority of whose citizens entertain such an opinion, punish with fine and imprisonment the act of selling beef and pork, imported from a sister State?

May a State engaged in the whale fishery prohibit the introduction of tallow candles, and make the sale of them criminal on any such pretence, or a State interested in the manufacture of the latter article prohibit the introduction of oil, or sperm candles?

It may be urged that no such abuse of this power is to be appre-

hended. But an answer to such a suggestion is found given by that eminent and learned judge who delivered the opinion of the court in the case of Brown v. Maryland, where he says,—"All power may be abused. It might with equal justice be said, that no State would be so blind to its own interest as to lay duties on importation which would either prohibit or diminish its trade. Yet the framers of our constitution have thought this a power which no State ought to exercise." And Justice Story, in his Commentaries (vol. 2, § 1066), lays down this express limitation to the power of a State to pass inspection laws, health laws, &c., — "that they do not conflict with the powers delegated to Congress." And Chief Justice Marshall says expressly, "that it cannot interfere with any regulation of commerce."

Let it not be forgotten that the oppressed and degraded condition of commerce was one of the most urgent and pressing reasons which induced the formation of the constitution. "Before that time each State regulated it with a single view to its own interest; and our disunited efforts to counteract their restrictions were rendered impotent by a want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power, in a great degree, useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce between the States."—2 Story's Commentaries, § 1054. This power, if it be permitted to the States, will be abused. There is no safety for the whole people in placing it anywhere save in those hands where the constitution has placed it. If, on any pretence, however specious, for the purpose of advancing any cause, however popular or praiseworthy, this function of the general government, so vital to its character, may be usurped by a State legislature, the barrier between the two powers is broken down, and the purposes of the Union itself defeated. Fanaticism never proposed a measure so wild and absurd, that specious and plausible arguments have not been devised to sustain the measures by which it would effect its object.

This case finds that the plaintiffs in error purchased this barrel of gin in Massachusetts. No law of any State, or of the Union, was violated by that act. They were, thus far, in the pursuit and prosecution of a lawful commerce. They brought it coastwise to the landing at Piscataqua Bridge (in New Hampshire), and from thence to their store in Dover. No law is yet broken. And then, in the same barrel, and in the same condition in which it was pur-

chased in Massachusetts, and in which they imported it from a sister State, they sold it to Sias. If, as this court has already decided, the same principles apply to commerce between the States that apply to commerce with foreign nations, may it not, without arrogance or presumption, be asked, if human ingenuity can honestly distinguish this case from the one already decided by this court, and so often referred to?

Perhaps I owe an apology to this honorable court for urging upon them arguments so familiar and principles so well settled; but believing, as my clients do, that, instead of receiving, as they were entitled to, the protection of the government in their lawful business, they have been branded as criminals, their property taken, and their constitutional rights trampled upon, they have, in the last resort, appealed to this tribunal for that redress and protection against unconstitutional State legislation, to afford which so eminently belongs to this honorable court.

They rely with confidence upon the assurance that here, at least, law may be administered, right defended, and justice maintained, uncontaminated by the breath of a local and temporary diseased sentiment, which, in its misguided and abortive attempts at reform, essays to eradicate physical and moral evil from society, and corruption from the human heart, by the wondrous efficiency of legislative enactment. They rely with confidence upon that protection to commerce which this court, on divers occasions, have extended, though, in so doing, they have been under the necessity of pronouncing the legislation of more than one State invalid and unconstitutional. It was to protect commerce that this Union was established. Take away that power from the general government, and the Union cannot long survive.

Having thus referred the court to the positions which I suppose sustain my clients, — positions occupied and illustrated by the profound learning, deep research, and luminous reasoning of Marshall and Story, in their expositions of this branch of the constitution, — I leave this case, in the confidence that my clients, in common with all the other citizens of this whole country, will ever find (as they ever have in times past) in this court a full and ample protection for their constitutional rights, against which the waves of fanaticism, as well as of faction, may beat harmlessly.

Mr. Burke, for the State.

(The argument upon the two first points, respecting the rights of the jury, is omitted.)

III. The third and last point raised in this case is the following, viz.: —

That the court by whom this cause was tried instructed the jury that the act of the legislature of the State of New Hampshire, approved July 4, 1838, under which the plaintiffs in error were in-

dicted, was not repugnant to the constitution of the United States, nor to any treaty between the United States and foreign nations.

The provisions of the constitution of the United States, to which the law of the State of New Hampshire is alleged to be repugnant, are in the following words : —

1. "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." Art. 1, § 10, part of 2d clause.

2. "The Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes." Art. 1, § 8, clause 3.

The act before mentioned is also alleged to be repugnant "to certain public treaties of the United States with Holland, France, and other countries, containing stipulations for the admission of spirits into the United States."

By the admission of the plaintiffs in error on the trial, it appears that the "gin" alleged in the indictment to have been sold by them was "American gin."

Therefore, taxing the gin, or prohibiting its sale, except upon the terms of the act of the State of New Hampshire, before referred to, did not conflict with the clause of the constitution of the United States first cited above; because it was not an "import," nor an "export," in the sense of that provision of the constitution.

And for the same reason, taxing, or restricting its sale, did not conflict with the first member of the second clause of the constitution, above cited, which clothes Congress with the power "to regulate commerce with foreign nations"; nor with the last member of the clause, which empowers Congress to regulate commerce "with the Indian tribes"; nor with the public treaties of the United States with foreign nations.

If it conflict with any provision of the constitution, it is with the second member of the second clause above cited, which gives Congress the power to regulate commerce "among the several States"; and that, it is apprehended, is the only question of which this tribunal has cognizance in this case. But, before proceeding to the argument of this question, the supposed ground on which the plaintiffs in error rely will be briefly examined.

It is anticipated that the plaintiffs in error will rely mainly on the case of Brown v. The State of Maryland, reported in 12 Wheat. 419; 6 Cond. Rep. 554. It therefore becomes necessary to compare the facts of that case with the present, and to examine the principles laid down by Chief Justice Marshall in giving the opinion of the court.

That case was an indictment for selling "one package of foreign dry goods," contrary to an act of the legislature of the State of Maryland, requiring all "importers" of "foreign goods and commodities," selling the same by wholesale, in bulk, to take out a li-

cense, under a penalty of one hundred dollars, and the forfeiture of the amount of the license tax, which was fifty dollars, for a neglect to comply with the provisions of the act. The act of the legislature of Maryland was a revenue law, and a tax imposed upon the importer under the form of a license tax, a revenue tax, and not a police regulation to restrain the sale of an article which was deemed injurious to the health and morals of the people of that State. The persons taxed were the importers of foreign goods, and not the dealers in articles of domestic manufacture or production. The case, therefore, of Brown *v.* The State of Maryland is different in all its features from the case at bar. It differs from it in two most prominent features: —

1. The act of the legislature of New Hampshire, under which the plaintiffs in error were indicted, was a police regulation, and not a revenue law.

2. The commodity sold was not an article of foreign production, nor an "import," but was an article of American manufacture.

These two circumstances distinguish the case at bar widely from the case relied on by the plaintiffs in error. The reasoning, therefore, of the court in Brown *v.* Maryland will not apply to this case.

But it is apprehended, that, if the "gin" sold by the plaintiffs in error had been imported, themselves not being the importers, they could not sustain their side of the case on the principles laid down by the court in Brown *v.* Maryland. Chief Justice Marshall says, the article is exempt from the taxing power of a State "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported." "This state of things," he adds, "is changed if he [the importer] sells them, or otherwise mixes them up with the property of the State, by breaking up the packages and travelling with them as an itinerant peddler." In which case "the tax finds the article already incorporated with the mass of property by the act of the importer." He "has himself mixed them up in the common mass; and the law may take them as it finds them."

From these principles two deductions follow: —

1. That the article is exempt from the taxing power of the State while it is in the possession of the importer in bulk, and has not become incorporated with the general mass of property in the State.

2. When it has thus become incorporated with the mass of property in a State, it is subject to all the laws, restrictions, regulations, and burdens to which other descriptions of the mass of property are subject.

In the case at bar, on the supposition that the gin was originally imported, the sale of it by the importer to the plaintiffs in error, and its subsequent transportation into New Hampshire, was such an incorporation of it with the mass of property in the State of New Hampshire as to subject it to the taxing power and police regula-

tions of the State, in the same manner and to the same extent to which all property within its jurisdiction was subject.

Again, it is admitted by the court in Brown *v.* Maryland, that the "police power" remains with the States. The act of the legislature of New Hampshire, under which the plaintiffs in error were indicted, is a portion of the police system of that State, and, according to Chief Justice Marshall, is not repugnant to the constitution of the United States.

But the plaintiffs in error may rely upon the *obiter dictum* of the court in Brown *v.* Maryland, that "we [the court] suppose the principles laid down in this case to apply equally to importations from a sister State." It cannot be supposed, however, that a remark thus casually and loosely expressed can be regarded as authority in the case at bar. If the gin had been foreign gin, and had been purchased by the plaintiffs in error in Massachusetts, and carried to New Hampshire, would it have been such an "importation from a sister State" as to exempt it from the taxing power or police regulations of the State of New Hampshire? And can the fact of its being "American gin," and of having been purchased in Massachusetts (whether manufactured there or not does not appear), give it greater privileges and exemptions in the State of New Hampshire, than if it had been manufactured in New Hampshire, carried to Massachusetts, and there purchased by the plaintiffs in error, and brought back by them to New Hampshire, and sold in the same vessel in which it was originally put up by the manufacturer? But this point will be more fully considered hereafter.

It may also be said, that the "gin" was purchased in Boston in the same barrel in which it was afterwards transported from Massachusetts to New Hampshire, and there sold. In other words, it was sold by the plaintiffs in error "in bulk," and therefore comes within the principles of the case of Brown *v.* Maryland, and could not be taxed by the laws of New Hampshire, nor its sale in any way regulated or restricted.

This position is not believed to be tenable. If it were, it would be impossible to prevent the evasion of the license laws of the State of New Hampshire. Ardent spirits could not be purchased in Massachusetts in vessels containing a less quantity than one barrel, — in vessels containing no more than a gallon, a quart, or a pint, and in that form carried into the State of New Hampshire, and sold in spite of the laws regulating the sale of spirituous liquors. It is believed that no such quibbling with, or evasion of, the laws of a State, can shelter itself under the provision of the constitution which grants to Congress the power "to regulate commerce among the several States."

But the case of Brown *v.* Maryland does not turn on the principle contended for. The taxing power of Maryland in that case seized hold of the commodity while it retained the character of an "import," and before it became incorporated with the genera. mass

of property in the State. In that state of the commodity, the court held that the taxing power of Maryland could not reach it. And one of the reasons assigned for the decision was, that the importer, by paying the duty upon the article to the United States, had purchased the right of selling it, of which he could not be deprived by the legislation of a State. In the case at bar, the plaintiffs in error had purchased no right to sell their gin by the payment of duties upon it; and, furthermore, it had become incorporated with the general mass of property in the State of New Hampshire.

But the true and only question involved in the case, and which is presented for the decision of this tribunal, is now approached.

Is the act of the legislature of New Hampshire regulating the sale of spirituous liquors, approved July 4, 1838, repugnant to that provision of the constitution of the United States which clothes Congress with the power "to regulate commerce among the several States"?

If it should be regarded as a law whose object was revenue alone, it is believed then not to be repugnant to the provision of the constitution just cited. But, before proceeding further, it becomes necessary to inquire into the meaning of this provision of the constitution, and the extent of the power which it delegates to Congress. And, in order to comprehend it clearly, it will be necessary to recur to the circumstances in the history of the country, prior to the adoption of the present constitution, which led to the investment of this power in Congress. Previous to that time, it is well known that the States comprising the Union had separate and independent systems of revenue, commerce, and navigation. One of their sources of revenue was the levying of duties on foreign imports. They had the same power over the products of other States, when imported into their jurisdictions. Each State legislated for itself, in relation to duties, tonnage, and navigation. Of course the exercise of this right to regulate commerce, which each State then possessed, led to numerous conflicts with the legislation and the interests of other States, which did not fail to engender deep and malignant animosities, as the history of the times abundantly proves. Trade was restricted between the States, and the interchange of commodities, so essential to the interests and advancement of all, was greatly embarrassed. Hence was there an imperative necessity to wrest this dangerous power from the individual States, and vest it in the general government, in order to secure a uniformity of its exercise. In Gibbons *v.* Ogden, 9 Wheat. 1, this power is assumed by the court to be exclusively vested in Congress. The extent, therefore, of the power embraces the whole of it, subject, however, to the inspection laws, health laws, police regulations, &c., &c., which the court, in the case last cited, admit belong to the great mass of general legislation reserved to the States.

But this power extends only to the transportation and introduc-

tion of articles of commerce from one State into the limits of another. When a commodity is introduced within the jurisdiction of another State, it becomes subject to the laws of that State. In other words, each State has the power to regulate the internal traffic within its limits. This position is sustained in Gibbons *v.* Ogden, 9 Wheat. 1; Brown *v.* The State of Maryland, 12 Wheat. 419; City of New York *v.* Miln, 11 Peters, 102.

The power to regulate commerce among the States is supervisory. It was designed by the framers of the constitution to secure to the several States of the Union a free interchange of their products, and their transit through the territories of each, unencumbered with any burdens, duties, or taxes, except such as grow out of the inspection, health, and police regulations of the respective States. In other words, it was designed to secure free trade among the States. And in accordance with this view of the power of Congress to regulate commerce between the States is that provision in the constitution which prohibits to the States the power "to lay any duty on tonnage"; and also that provision of the constitution which prohibits any "regulation of commerce or revenue, which shall give preference to the 'ports of one State over those of another.'" Thus it is the manifest intention of the constitution that the power of Congress over commerce between the States shall be supervisory merely, and exerted only to secure perfect freedom of trade and intercourse between the States. (See the Federalist, No. 42, p. 182, Wash. edition, 1831.) With this view, Congress has passed navigation laws, which secure to the vessels of one State the same privileges in the ports of another State which the vessels of the latter enjoy in its own ports.

But does the act of the legislature of New Hampshire interfere with this power of Congress "to regulate commerce among the States," as above defined? Does it prevent the unrestricted introduction of articles from other States into the State of New Hampshire, or their free transit through its territories? It may be safely affirmed that it does not.

It is stated in the bill of exceptions, that the gin sold by the plaintiffs in error was brought from Boston, the place of its purchase, "coastwise to the landing at Piscataqua Bridge, and from thence to the defendants' store in Dover." But can the mode by which the article was transported from Massachusetts, and introduced into the territory of New Hampshire, secure to it any constitutional protection? It will not be pretended. The gin would have been entitled to the same privileges and immunities if it had been transported by railroad, or by one of the numerous baggage-wagons which run to and from Massachusetts and New Hampshire. It cannot be a privileged article, because it was carried "coastwise" into the State of New Hampshire. But it may be confidently affirmed that Congress, under the general power "to reg-

ulate commerce among the several States," cannot secure to the productions and manufactures of one State, imported into another State for sale and consumption, greater privileges and exemptions than the productions and manufactures of the latter would enjoy within its own jurisdiction. Congress cannot give to the productions and manufactures of Massachusetts, which are carried into New Hampshire for sale and consumption, greater privileges and exemptions than the productions and manufactures of the latter State would possess within the limits of its own territories. The "barrel of gin" purchased by the plaintiffs in error in Massachusetts, and carried to New Hampshire for sale and consumption, could not claim greater privileges and exemptions than a "barrel of gin" manufactured in the State of New Hampshire. The former must be subject to the same laws and regulations to which the latter would be subject. And it will hardly be pretended that the legislature of New Hampshire could not pass laws regulating the sale, within its own limits, of spirituous liquors, or of any other article manufactured within its own jurisdiction. And if Congress should attempt to interfere in such a case, it would be a most gross and palpable invasion of the reserved rights and the internal police of New Hampshire.

But it may be contended that the license law of the State of New Hampshire conflicts with the provision of the constitution which gives Congress power to regulate commerce among the States, because it is general and sweeping in its provisions, and prohibits the sale of wines and spirituous liquors in any quantity. Such a position, if assumed, cannot be maintained by any sound argument. It would make the constitutional question involved in this case depend upon the quantity of liquor sold, and not the thing itself. And where should be the limit of the law as to the quantity the sale of which it would be constitutional to prohibit? Would it be confined to a pint, a quart, or a gallon? And could the grave constitutional question raised in this case depend upon an absurdity so palpable, not to say ridiculous?

But the subjection of the productions of one State, when introduced for the purpose of sale and consumption within the territories of another, to the internal laws and regulations of the latter State, finds an analogy in the case of the citizens of one State going into the jurisdiction of another.

The constitution provides, that "the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States." Citizens of one State, going into the jurisdiction of another State, can claim no exemption from its laws under this clause. If they enter the territory of another State merely to pass through it, the power of the law surrounds them to protect them from violence and to restrain them from crime. If they violate the laws of the State into whose territory they pass, they are subject,

like all the citizens of that State, to all the penalties which the laws impose. If they remain in the State, they become subject to the taxing power, and all the burdens and restraints which its laws impose upon its own citizens. Can an article of commerce, produced in one State and carried into another for sale and consumption, claim greater privileges and exemptions in the latter State than citizens of the same State passing into another can claim? Such a position will hardly be ventured upon.

But, finally, it is contended for the State of New Hampshire, that the act of July 4, 1838, under which the plaintiffs in error were indicted, is a police regulation, which it was within the competency of the legislature of that State to enact, and is therefore not repugnant to the constitution of the United States.

In the case of Gibbons *v.* Ogden, 9 Wheat. 203, the court say, that "inspection laws, quarantine laws, health laws, of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike-roads, ferries, &c., are component parts of that immense mass of legislation which embraces every thing within the territory of a State not surrendered to the general government."

The law of the legislature of New Hampshire under consideration is a police regulation. Its design and object are to preserve the public morals and health of the State, and it is clearly within the recognized constitutional authority of the legislature of that State to enact. This power, it is admitted by the court, in the cases of Brown *v.* Maryland, Gibbons *v.* Ogden, and The City of New York *v.* Miln, all before cited, the States may exercise, even if it interfere with foreign commerce. The States may pass laws regulating the sale of gunpowder, which is clearly a police regulation, and necessary for the safety of the people, particularly in large cities. They may, also, by their health laws, intercept and prohibit the sale of an infected article, notwithstanding the duty may have been paid on it, and it may yet remain in the hands of the importer, in bulk, in the character of an import; *a fortiori* may they intercept and prohibit the sale of an infected article, produced in another State, and transported within the jurisdiction of the former for sale. For the same reason may the States, by their police regulations, prohibit the sale of obscene books, imported from a foreign country, notwithstanding the duty may have been paid on them, and they may remain in the original package. So, also, may they prohibit the sale of an obscene book written in this country, on which the copyright has been secured from the government of the United States, notwithstanding the fee required in such cases has been paid. Such cases, it is believed, would be analogous in principle to the power to regulate or prohibit the sale of spirituous liquors. On this point the following cases are relied on: Lunt's case, 6 Greenleaf's (Maine) Rep. 412; Beal, plaintiff in error, *v.* The State of In-

diana; 4 Blackford, 107; King v. Cooper, plaintiff in error, 2 Scammon, 305.

And in confirmation of the authorities cited on this point, it may be observed that the license system was adopted in England at a very early period of her history, and has ever since composed a part of the police system of that kingdom. See Crabbe's History of English Law (London edit.), p. 477; see also the different enactments of the British Parliament, in 7 Evans's Statutes, pp. 1–32, title *Ale-houses*. Many of the English statutes relate to the sale of imported as well as domestic liquors. They, of course, conflict with the import as well as excise systems of that government; and yet, it is believed, they never have been called in question.

License regulations were also adopted by the provincial legislature of New Hampshire at an early period. See Provincial Laws of New Hampshire (edit. of 1761), pp. 64, 143.

Similar legislation, it is believed, has been adopted in nearly every State in the Union.

But if the law of the legislature of New Hampshire, now under consideration, shall not be regarded as a police regulation, it is clearly a law regulating the internal commerce of the State, and therefore constitutional, according to the doctrine laid down in Gibbons v. Ogden, before cited. It may also claim analogy with the laws relating to hawkers and peddlers, which, it is believed, have been enacted in some form in every State in the Union.

And, in conclusion, the remark will be ventured upon (although, perhaps, not appropriate in a mere argument), that the people of the State of New Hampshire, almost without distinction of age, sex, or condition, feel a deep and absorbing interest in the final issue of this question. Their sentiments concur with the sense of nearly the whole civilized world, which now concedes that the traffic in intoxicating liquors is a crime against society. It is disapproved by man, and stands condemned by the great moral Judge of the universe, whose purity cannot countenance such manifest and admitted wrong. It is the foul parent of immorality and crime, and the prolific source of unspeakable misery and sorrow to innumerable individuals and families. And is it to be contended that it is repugnant to the constitution of the United States to restrain and prohibit such inhuman traffic? — to extirpate a moral crime, which grows blacker and more hideous the longer it is contemplated, and the more its horrible effects become visible? And deeply anxious are the people of New Hampshire that this vicious trade shall receive no countenance from the judgment of the august and enlightened tribunal to whose arbitrament this cause is now most respectfully submitted.

Mr. Chief Justice TANEY.

In the cases of Thurlow *v.* The State of Massachusetts, of Fletcher *v.* The State of Rhode Island, and of Peirce et al. *v.* The State of New Hampshire, the judgments of the respective State courts are severally affirmed.

The justices of this court do not, however, altogether agree in the principles upon which these cases are decided, and I therefore proceed to state the grounds upon which I concur in affirming the judgments. The first two of these cases depend upon precisely the same principles; and although the case against the State of New Hampshire differs in some respects from the others, yet there are important principles common to all of them, and on that account it is more convenient to consider them together. Each of the cases has arisen upon State laws, passed for the purpose of discouraging the use of ardent spirits within their respective territories, by prohibiting their sale in small quantities, and without licenses previously obtained from the State authorities. And the validity of each of them has been drawn in question, upon the ground that it is repugnant to that clause of the constitution of the United States which confers upon Congress the power to regulate commerce with foreign nations and among the several States.

The cases have been separately and fully and ably argued, and the questions which they involve are undoubtedly of the highest importance. But the construction of this clause in the constitution has been so fully discussed at the bar, and in the opinions delivered by the court in former cases, that scarcely any thing can be suggested at this day calculated to throw much additional light upon the subject, or any argument offered which has not heretofore been considered, and commented on, and which may not be found in the reports of the decisions of this court.

It is not my purpose to enter into a particular examination of the various passages in different opinions of the court, or of some of its members, in former cases, which have been referred to by counsel, and relied upon as supporting the construction of the constitution for which they are respectively contending. And I am the less inclined to do so because I think these controversies often arise from looking to detached passages in the opinions, where general expressions are sometimes used, which, taken by themselves, are susceptible of a construction that the court never intended should be given to them, and which in some instances would render different portions of the opinion inconsistent with each other. It is only by looking to the case under consideration at the time, and taking the whole opinion together, in all its bearings, that we can correctly understand the judgment of the court.

The constitution of the United States declares that that constitution, and the laws of the United States which shall be made in pur-

suance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. It follows that a law of Congress regulating commerce with foreign nations, or among the several States, is the supreme law; and if the law of a State is in conflict with it, the law of Congress must prevail, and the State law cease to operate so far as it is repugnant to the law of the United States.

It is equally clear, that the power of Congress over this subject does not extend further than the regulation of commerce with foreign nations and among the several States; and that beyond these limits the States have never surrendered their power over trade and commerce, and may still exercise it, free from any controlling power on the part of the general government. Every State, therefore, may regulate its own internal traffic, according to its own judgment and upon its own views of the interest and well-being of its citizens.

I am not aware that these principles have ever been questioned. The difficulty has always arisen on their application; and that difficulty is now presented in the Rhode Island and Massachusetts cases, where the question is how far a State may regulate or prohibit the sale of ardent spirits, the importation of which from foreign countries has been authorized by Congress. Is such a law a regulation of foreign commerce, or of the internal traffic of the State?

It is unquestionably no easy task to mark by a certain and definite line the division between foreign and domestic commerce, and to fix the precise point, in relation to every imported article, where the paramount power of Congress terminates, and that of the State begins. The constitution itself does not attempt to define these limits. They cannot be determined by the laws of Congress or the States, as neither can by its own legislation enlarge its own powers, or restrict those of the other. And as the constitution itself does not draw the line, the question is necessarily one for judicial decision, and depending altogether upon the words of the constitution.

This question came directly before the court for the first time in the case of Brown *v.* The State of Maryland, 12 Wheat. 419. And the court there held that an article authorized by a law of Congress to be imported continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale, in the original bale, package, or vessel in which it was imported; that the authority given to import necessarily carried with it the right to sell the imported article in the form and shape in which it was imported, and that no State, either by direct assessment or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported beyond what the law of Congress had itself imposed; but that when the original package was broken up for use or for retail by the im-

porter, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import, or a part of foreign commerce, and became subject to the laws of the State, and might be taxed for State purposes, and the sale regulated by the State, like any other property. This I understand to be substantially the decision in the case of Brown *v.* The State of Maryland, drawing the line between foreign commerce, which is subject to the regulation of Congress, and internal or domestic commerce, which belongs to the States, and over which Congress can exercise no control.

I argued the case in behalf of the State, and endeavoured to maintain that the law of Maryland, which required the importer as well as other dealers to take out a license before he could sell, and for which he was to pay a certain sum to the State, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought the decision of the court restricted the powers of the State more than a sound construction of the constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the judicial mind. In the nature of things, the line of division is in some degree vague and indefinite, and I do not see how it could be drawn more accurately and correctly, or more in harmony with the obvious intention and object of this provision in the constitution. Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the State government. The immense amount of foreign products used and consumed in this country are imported, landed, and offered for sale in a few commercial cities, and a very small portion of them are intended or expected to be used in the State in which they are imported. A great (perhaps the greater) part imported, in some of the cities, is not owned or brought in by citizens of the State, but by citizens of other States, or foreigners. And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely *in transitu*, and on their way to the distant cities, villages, and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported. And a tax upon them while in this condition, for State purposes, whether by direct assessment, or indirectly, by requiring a license to sell, would be hardly more justifiable in prin-

ciple than a transit duty upon the merchandise when passing through a State. A tax in any shape upon imports is a tax on the consumer, by enhancing the price of the commodity. And if a State is permitted to levy it in any form, it will put it in the power of a maritime importing State to raise a revenue for the support of its own government from citizens of other States, as certainly and effectually as if the tax was laid openly and without disguise as a duty on imports. Such a power in a State would defeat one of the principal objects of forming and adopting the constitution. It cannot be done directly, in the shape of a duty on imports, for that is expressly prohibited. And as it cannot be done directly, it could hardly be a just and sound construction of the constitution which would enable a State to accomplish precisely the same thing under another name, and in a different form.

Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner. But a tax of this description stands upon a very different footing from a tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the State. Nor, indeed, can it even influence materially the price of the commodity to the consumer, since foreigners, as well as citizens of other States, who are not chargeable with the tax, may import goods into the same place and offer them for sale in the same market, and with whom the resident merchant necessarily enters into competition.

Adopting, therefore, the rule as laid down in Brown *v.* The State of Maryland, I proceed to apply it to the cases of Massachusetts and Rhode Island. The laws of Congress regulating foreign commerce authorize the importation of spirits, distilled liquors, and brandy, in casks or vessels not containing less than a certain quantity, specified in the laws upon this subject. Now, if the State laws in question came in collision with those acts of Congress, and prevented or obstructed the importation or sale of these articles by the importer in the original cask or vessel in which they were imported, it would be the duty of this court to declare them void.

It has, indeed, been suggested, that, if a State deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice, and pauperism into the State, it may constitutionally refuse to permit its importation, notwithstanding the laws of Congress; and that a State may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence, or pauperism from abroad. But it must be remembered that disease, pestilence, and pauperism are not subjects of com-

merce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists. And Congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted, and what excluded; and may therefore admit, or not, as it shall deem best, the importation of ardent spirits. And inasmuch as the laws of Congress authorize their importation, no State has a right to prohibit their introduction.

But I do not understand the law of Massachusetts or Rhode Island as interfering with the trade in ardent spirits while the article remains a part of foreign commerce, and is in the hands of the importer for sale, in the cask or vessel in which the laws of Congress authorize it to be imported. These State laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the State. These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper. Of the wisdom of this policy, it is not my province or my purpose to speak. Upon that subject, each State must decide for itself. I speak only of the restrictions which the constitution and laws of the United States have imposed upon the States. And as these laws of Massachusetts and Rhode Island are not repugnant to the constitution of the United States, and do not come in conflict with any law of Congress passed in pursuance of its authority to regulate commerce with foreign nations and among the several States, there is no ground upon which this court can declare them to be void.

I come now to the New Hampshire case, in which a different principle is involved,—the question, however, arising under the same clause in the constitution, and depending on its construction.

The law of New Hampshire prohibits the sale of distilled spirits,

in any quantity, without a license from the selectmen of the town in which the party resides. The plaintiffs in error, who were merchants in Dover, in New Hampshire, purchased a barrel of gin in Boston, brought it to Dover, and sold it in the cask in which it was imported, without a license from the selectmen of the town. For this sale they were indicted, convicted, and fined, under the law above mentioned.

The power to regulate commerce among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it. And, according to the doctrine in Brown *v.* Maryland, the article in question, at the time of the sale, was subject to the legislation of Congress.

The present case, however, differs from Brown *v.* The State of Maryland in this, — that the former was one arising out of commerce with foreign nations, which Congress had regulated by law; whereas the present is a case of commerce between two States, in relation to which Congress has not exercised its power. Some acts of Congress have indeed been referred to in relation to the coasting trade. But they are evidently intended merely to prevent smuggling, and do not regulate imports or exports from one State to another. This case differs also from the cases of Massachusetts and Rhode Island; because, in these two cases, the laws of the States operated upon the articles after they had passed beyond the limits of foreign commerce, and consequently were beyond the control and power of Congress. But the law of New Hampshire acts directly upon an import from one State to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and subject to its control and regulation.

The question, therefore, brought up for decision is, whether a State is prohibited by the constitution of the United States from making any regulations of foreign commerce, or of commerce with another State, although such regulation is confined to its own territory, and made for its own convenience or interest, and does not come in conflict with any law of Congress. In other words, whether the grant of power to Congress is of itself a prohibition to the States, and renders all State laws upon the subject null and void. This is the question upon which the case turns; and I do not see how it can be decided upon any other ground, provided we adopt the line of division between foreign and domestic commerce as marked out by the court in Brown *v.* The State of Maryland. I proceed, therefore, to state my opinion upon it.

It is well known that upon this subject a difference of opinion has existed, and still exists, among the members of this court. But with every respect for the opinion of my brethren with whom I

do not agree, it appears to me to be very clear, that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet, in my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbours, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress. Such evidently I think was the construction which the constitution universally received at the time of its adoption, as appears from the legislation of Congress and of the several States; and a careful examination of the decisions of this court will show, that, so far from sanctioning the opposite doctrine, they recognize and maintain the power of the States.

The language in which the grant of power to the general government is made certainly furnishes no warrant for a different construction, and there is no prohibition to the States. Neither can it be inferred by comparing the provision upon this subject with those that relate to other powers granted by the constitution to the general government. On the contrary, in many instances, after the grant is made, the constitution proceeds to prohibit the exercise of the same power by the States in express terms; in some cases absolutely, in others without the consent of Congress. And if it was intended to forbid the States from making any regulations of commerce, it is difficult to account for the omission to prohibit it, when that prohibition has been so carefully and distinctly inserted in relation to other powers, where the action of the State over the same subject was intended to be entirely excluded. But if, as I think, the framers of the constitution (knowing that a multitude of minor regulations must be necessary, which Congress amid its great concerns could never find time to consider and provide) intended merely to make the power of the federal government supreme upon this subject over that of the States, then the omission of any prohibition is accounted for, and is consistent with the whole instrument. The supremacy of the laws of Congress, in cases of collision with State laws, is secured in the article which declares that the laws of Congress, passed in pursuance of the powers granted, shall be the supreme law; and it is only where both governments may legislate on the same subject that this article can operate. For if the mere grant of power to the general government was in itself a prohibition to the States, there would seem to be no necessity for providing for the supremacy of the laws of Congress, as all State laws upon the subject would be *ipso facto* void, and there could therefore be no such thing as conflicting laws, nor any question

about the supremacy of conflicting legislation. It is only where both may legislate on the subject, that the question can arise.

I have said that the legislation of Congress and the States has conformed to this construction from the foundation of the government. This is sufficiently exemplified in the laws in relation to pilots and pilotage, and the health and quarantine laws.

In relation to the first, they are admitted on all hands to belong to foreign commerce, and to be subject to the regulations of Congress, under the grant of power of which we are speaking. Yet they have been continually regulated by the maritime States, as fully and entirely since the adoption of the constitution as they were before; and there is but one law of Congress making any specific regulation upon the subject, and that passed as late as 1837, and intended, as it is understood, to alter only a single provision of the New York law, leaving the residue of its provisions entirely untouched. It is true, that the act of 1789 provides that pilots shall continue to be regulated by the laws of the respective States then in force, or which may thereafter be passed, until Congress shall make provision on the subject. And undoubtedly Congress had the power, by assenting to the State laws then in force, to make them its own, and thus make the previous regulations of the States the regulations of the general government. But it is equally clear, that, as to all future laws by the States, if the constitution deprived them of the power of making any regulations on the subject, an act of Congress could not restore it. For it will hardly be contended that an act of Congress can alter the constitution, and confer upon a State a power which the constitution declares it shall not possess. And if the grant of power to the United States to make regulations of commerce is a prohibition to the States to make any regulation upon the subject, Congress could no more restore to the States the power of which it was thus deprived, than it could authorize them to coin money, or make paper-money a tender in the payment of debts, or to do any other act forbidden to them by the constitution. Every pilot law in the commercial States has, it is believed, been either modified or passed since the act of 1789 adopted those then in force; and the provisions since made are all void, if the restriction on the power of the States now contended for should be maintained; and the regulations made, the duties imposed, the securities required, and penalties inflicted by these various State laws are mere nullities, and could not be enforced in a court of justice. It is hardly necessary to speak of the mischiefs which such a construction would produce to those who are engaged in shipping, navigation, and commerce. Up to this time their validity has never been questioned. On the contrary, they have been repeatedly recognized and upheld by the decisions of this court; and it will be difficult to show how this can be done, except upon the construction of the constitution which I am now maintaining:

So, also, in regard to health and quarantine laws. They have been continually passed by the States ever since the adoption of the constitution, and the power to pass them recognized by acts of Congress, and the revenue officers of the general government directed to assist in their execution. Yet all of these health and quarantine laws are necessarily, in some degree, regulations of foreign commerce in the ports and harbours of the State. They subject the ship, and cargo, and crew to the inspection of a health-officer appointed by the State; they prevent the crew and cargo from landing until the inspection is made, and destroy the cargo if deemed dangerous to health. And during all this time the vessel is detained at the place selected for the quarantine ground by the State authority. The expenses of these precautionary measures are also usually, and I believe universally, charged upon the master, the owner, or the ship, and the amount regulated by the State law, and not by Congress. Now, so far as these laws interfere with shipping, navigation, or foreign commerce, or impose burdens upon either of them, they are unquestionably regulations of commerce. Yet, as I have already said, the power has been continually exercised by the States, has been continually recognized by Congress ever since the adoption of the constitution, and constantly affirmed and supported by this court whenever the subject came before it.

The decisions of this court will also, in my opinion, when carefully examined, be found to sanction the construction I am maintaining. It is not my purpose to refer to all of the cases in which this question has been spoken of, but only to the principal and leading ones; and, —

First, to Gibbons *v.* Ogden, because this is the case usually referred to and relied on to prove the exclusive power of Congress and the prohibition to the States. It is true that one or two passages in that opinion, taken by themselves, and detached from the context, would seem to countenance this doctrine. And, indeed, it has always appeared to me that this controversy has mainly arisen out of that case, and that this doctrine of the exclusive power of Congress, in the sense in which it is now contended for, is comparatively a modern one, and was never seriously put forward in any case until after the decision of Gibbons *v.* Ogden, although it has been abundantly discussed since. Still, it seems to me to be clear, upon a careful examination of that case, that the expressions referred to do not warrant the inference drawn from them, and were not used in the sense imputed to them; and that the opinion in that case, when taken altogether and with reference to the subject-matter before the court, establishes the doctrine that a State may, in the execution of its powers of internal police, make regulations of foreign commerce; and that such regulations are valid, unless they come into collision with a law of Congress. Upon examining that opinion, it will be seen that the court, when it uses the expressions

which are supposed to countenance the doctrine of exclusive power in Congress, is commenting upon the argument of counsel in favor of equal powers on this subject in the States and the general government, where neither party is bound to yield to the other; and is drawing the distinction between cases of concurrent powers and those in which the supreme or paramount power was granted to Congress. It therefore very justly speaks of the States as exercising their own powers in laying taxes for State purposes, although the same thing is taxed by Congress; and as exercising the powers granted to Congress when they make regulations of commerce. In the first case, the State power is concurrent with that of the general government, — is equal to it, and is not bound to yield. In the second, it is subordinate and subject to the superior and controlling power conferred upon Congress. And it is solely with reference to this distinction, and in the midst of this argument upon it, that the court uses the expressions which are supposed to maintain an absolute prohibition to the States. But it certainly did not mean to press the doctrine to that extent. For it does not decide the case on that ground (although it would have been abundantly sufficient, if the court had entertained the opinion imputed to it), but, after disposing of the argument which had been offered in favor of concurrent powers, it proceeds immediately, in a very full and elaborate argument, to show that there was a conflict between the law of New York and the act of Congress, and explicitly puts its decision upon that ground. Now the whole of this part of the opinion would have been unnecessary and out of place, if the State law was of itself a violation of the constitution of the United States, and therefore utterly null and void, whether it did or did not come in conflict with the law of Congress.

Moreover, the court distinctly admits, on pages 205, 206, that a State may, in the execution of its police and health laws, make regulations of commerce, but which Congress may control. It is very clear, that, so far as these regulations are merely internal, and do not operate on foreign commerce, or commerce among the States, they are altogether independent of the power of the general government and cannot be controlled by it. The power of control, therefore, which the court speaks of, presupposes that they are regulations of foreign commerce, or commerce among the States. And if a State, with a view to its police or health, may make valid regulations of commerce which yet fall within the controlling power of the general government, it follows that the State is not absolutely prohibited from making regulations of foreign commerce within its own territorial limits, provided they do not come in conflict with the laws of Congress.

It has been said, indeed, that quarantine and health laws are passed by the States, not by virtue of a power to regulate commerce, but by virtue of their police powers, and in order to guard

the lives and health of their citizens. This, however, cannot be said of the pilot laws, which are yet admitted to be equally valid. But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States. And when the validity of a State law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.

Upon this question the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power. Are the States absolutely prohibited by the constitution from making any regulations of foreign commerce? If they are, then such regulations are null and void, whatever may have been the motive of the State or whatever the real object of the law; and it requires no law of Congress to control or annul them. Yet the case of Gibbons *v.* Ogden unquestionably affirms that such regulations may be made by a State, subject to the controlling power of Congress. And if this may be done, it necessarily follows that the grant of power to the federal government is not an absolute and entire prohibition to the States, but merely confers upon Congress the superior and controlling power. And to expound the particular passages herein before mentioned in the manner insisted upon by those who contend for the prohibition would be to make different parts of that opinion inconsistent with each other, — an error which I am quite sure no one will ever impute to the very eminent jurist by whom the opinion was delivered.

And that the meaning of the court in the case of Gibbons *v.* Ogden was such as I have insisted on is, I think, conclusively proved by the case of Willson et al. *v.* The Blackbird Creek Marsh Company, 2 Peters, 251, 252. In that case a dam authorized by a State law had been erected across a navigable creek, so as to obstruct the commerce above it. And the validity of the State law was objected to, on the ground that it was repugnant to the constitution of the United States, being a regulation of commerce. But the court says, — "The repugnancy of the law of Delaware to the

constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several States; a power which has not been so exercised as to affect the question", and then proceeds to decide that the law of Delaware could not "be considered as repugnant to the power to regulate commerce in its dormant State, or as being in conflict with any law passed on the subject."

The passages I have quoted show that the validity of the State law was maintained because it was not in conflict with a law of Congress, although it was confessedly within the limits of the power granted. And it is worthy of remark, that the counsel for the plaintiff in error in that case relied upon Gibbons *v.* Ogden as conclusive authority to show the unconstitutionality of the State law, no doubt placing upon the passages I have mentioned the construction given to them by those who insist upon the exclusiveness of the power. This case, therefore, was brought fully to the attention of the court. And the decision in the last case, and the grounds on which it was placed, in my judgment show most clearly what was intended in Gibbons *v.* Ogden; and that in that case, as well as in the case of Willson *v.* The Blackbird Creek Marsh Company, the court held that a State law was not invalid merely because it made regulations of commerce, but that its invalidity depended upon its repugnancy to a law of Congress passed in pursuance of the power granted. And it is worthy, also, of remark, that the opinion in both of these cases was delivered by Chief Justice Marshall; and I consider his opinion in the latter one as an exposition of what he meant to decide in the former.

In the case of the City of New York *v.* Miln, 11 Peters, 130, the question as to the power of the States upon this subject was very fully discussed at the bar. But no opinion was expressed upon it by the court, because the case did not necessarily involve it, and there was great diversity of opinion on the bench. Consequently the point was left open, and has never been decided in any subsequent case in this court.

For my own part, I have always regarded the cases of Gibbons *v.* Ogden, and Willson *v.* The Blackbird Creek Marsh Company, as abundantly sufficient to sanction the construction of the constitution which in my judgment is the true one. Their correctness has never been questioned; and I forbear, therefore, to remark on the other cases in which this subject has been mentioned and discussed.

It may be well, however, to remark, that in analogous cases, where, by the constitution of the United States, power over a particular subject is conferred on Congress without any prohibition to the States, the same rule of construction has prevailed. Thus, in the case of Houston *v.* Moore, 5 Wheat. 1, it was held, that the grant of power to the federal government to provide for organizing, arming, and disciplining the militia did not preclude the States from

legislating on the same subject, provided the law of the State was not repugnant to the law of Congress. And every State in the Union has continually legislated on the subject, and I am not aware that the validity of these laws has ever been disputed, unless they came in conflict with the law of Congress.

The same doctrine was held in the case of Sturges *v.* Crowninshield, 4 Wheat. 196, under the clause in the constitution which gives to Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States.

And in the case of Chirac *v.* Chirac, 2 Wheat. 269, which arose under the grant of power to establish a uniform rule of naturalization, where the court speak of the power of Congress as exclusive, they are evidently merely sanctioning the argument of counsel stated in the preceding sentence, which placed the invalidity of the naturalization under the law of Maryland, not solely upon the grant of power in the constitution, but insisted that the Maryland law was "virtually repealed by the constitution of the United States, and the act of naturalization enacted by Congress." Undoubtedly it was so repealed, and the opposing counsel in the case did not dispute it. For the law of the United States covered every part of the Union, and there could not, therefore, by possibility be a State law which did not come in conflict with it. And, indeed, in this case it might well have been doubted whether the grant in the constitution itself did not abrogate the power of the States, inasmuch as the constitution also provided, that the citizens of each State should be entitled to all the privileges and immunities of citizens in the several States; and it would seem to be hardly consistent with this provision to allow any one State, after the adoption of the constitution, to exercise a power, which, if it operated at all, must operate beyond the territory of the State, and compel other States to acknowledge as citizens those whom it might not be willing to receive.

In referring to the opinions of those who sat here before us, it is but justice to them, in expounding their language, to keep in mind the character of the case they were deciding. And this is more especially necessary in cases depending upon the construction of the constitution of the United States; where, from the great public interests which must always be involved in such questions, this court have usually deemed it advisable to state very much at large the principles and reasoning upon which their judgment was founded, and to refer to and comment on the leading points made by the counsel on either side in the argument. And I am not aware of any instance in which the court have spoken of the grant of power to the general government as excluding all State power over the subject, unless they were deciding a case where the power had been exercised by Congress, and a State law came in conflict with it. In cases of this kind, the power of Congress undoubtedly excludes

and displaces that of the State; because, wherever there is collision between them, the law of Congress is supreme. And it is in this sense only, in my judgment, that it has been spoken of as exclusive in the opinions of the court to which I have referred. The case last mentioned is a striking example; for there the language of the court, affirming in the broadest terms the exclusiveness of the power, evidently refers to the argument of counsel stated in the preceding sentence.

Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one. For, although the gin sold was an import from another State, and Congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several States, yet, as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue.

The judgment of the State courts ought, therefore, in my opinion, to be affirmed in each of the three cases before us.

Mr. Justice McLEAN.

THURLOW *v.* THE COMMONWEALTH OF MASSACHUSETTS.—*Error from the State Court.*

The plaintiff was indicted and convicted under the Revised Statutes of Massachusetts, chapter 47, and the act of 1837, chapter 242, for selling foreign spirits, in 1841 and 1842, without a license.

The third section of the revised act provides that no person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, "under the penalty of twenty dollars." The seventeenth section authorizes the county commissioners to grant licenses; and the second section of the act of 1837 provides, that nothing contained in that act, or in the forty-seventh chapter of the Revised Statutes, shall be so construed as to require the county commissioners to grant any licenses, when in their opinion the public good does not require them to be granted."

On the trial in the Court of Common Pleas it was objected that a part of the spirits sold were foreign; but the court instructed the jury that such sale was in violation of the statute, which was not inconsistent with the constitution or revenue laws of the United States. On this ruling of the court an exception was taken, and the cause was removed to the Supreme Court of the State of Massachusetts, which overruled the exception, and entered a judgment on the verdict against the defendant.

The acts of Congress authorize the importation of spirits in casks of fifteen gallons, and wine in bottles.

The great question in this case is, whether the license laws of Massachusetts are repugnant to the constitution of the United States, or the revenue laws which have been enacted under it.

And, first, it is insisted that they are unconstitutional, as they prohibit the importer from selling an article that he is authorized to import, without the payment of an additional duty, or impost, which the State cannot impose.

The case of Brown *v.* The State of Maryland, 12 Wheat. 419, is supposed to be conclusive upon this point. This may be admitted, and yet it does not rule the case before us.

Brown was charged with having imported and sold a package of dry goods without a license. An act of Maryland required all importers, before the sale of their imported articles, to take out a license. And the court held, "that a tax on the sale of an article, imported only for sale, is a tax on the article itself"; — "that the importation gave a right to the importer to sell the package in question free from any charge by the State, and consequently that the act of Maryland was unconstitutional and void, as being repugnant to that article of the constitution which declares, that no State shall lay an impost or duties on imports or exports."

The act was also held to be repugnant to that clause in the constitution which "empowers Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In Brown's case the reasoning of the court and their decision turned upon the fact, that he, being the importer of the package, had a right to sell it; that this right continued so long as the package was unbroken, and remained the property of the importer.

The plaintiff, Thurlow, asserts no right as an importer of the article sold. He purchased it in the home market; consequently neither the general reasoning nor the ruling of the court in Brown's case can control this one.

The tenth amendment of the constitution declares, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Before the adoption of the constitution, the States possessed, respectively, all the attributes of sovereignty. In their organic laws they had distributed their powers of government according to their own views, subject to such modifications as the people of each State might sanction. The agencies established by the articles of confederation were not entitled to the dignified appellation of government

Among the delegated functions it is declared, that "Congress shall have power to regulate commerce with foreign nations, and

among the several States, and with the Indian tribes." This investiture of power is declared by this court, in the case of Gibbons *v.* Ogden, 9 Wheat. 1, and also in Brown *v.* The State of Maryland, "to be complete in itself, and to acknowledge no limitations other than are prescribed by the constitution."

There may be a limitation on the exercise of sovereign powers, but that State is not sovereign which is subject to the will of another. This remark applies equally to the federal and State governments. The federal government is supreme within the scope of its delegated powers, and the State governments are equally supreme in the exercise of those powers not delegated by them nor inhibited to them. From this it is clear, that while these supreme functions are exercised by the federal and State governments, within their respective limitations, they can never come in conflict. And when a conflict occurs, the inquiry must necessarily be, which is the paramount law? And that must depend upon the supremacy of the power by which it was enacted. The federal government is supreme in the exercise of powers delegated to it, but beyond this its acts are unconstitutional and void. So the acts of the States are void when they do that which is inhibited to them, or exercise a power which they have exclusively delegated to the federal government.

The power to tax is common to the federal and State governments, and it may be exercised by each in taxing the same property; but this produces no conflict of jurisdiction. The conflicts which have arisen are mainly attributable to the want of an accurate definition and a clear comprehension of the respective powers of the two governments. In a system of government so complex as ours, it may be difficult, perhaps impracticable, to prescribe the exact limit, in particular cases, to federal and State powers.

The powers expressly prohibited to the States are few in number, and are specified in the constitution. Those which are exclusively delegated to the federal government, and consequently, by implication, are prohibited to the States, are more numerous.

The States, resting upon their original basis of sovereignty, subject only to the exceptions stated, exercise their powers over every thing connected with their social and internal condition. A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. They appertain to the State sovereignty as exclusively as powers exclusively delegated appertain to the general government.

The license acts of Massachusetts do not purport to be a regulation of commerce. They are essentially police laws. Enactments similar in principle are common to all the States. Since the adoption of its constitution they have existed in Massachusetts. A great

moral reform, which enlisted the judgments and excited the sympathies of the public, has given notoriety to this course of legislation, and extended it, lately, beyond its former limit. And the question is now raised, whether the laws under consideration trench upon the power of Congress to regulate foreign commerce.

These laws do not in terms prohibit the sale of foreign spirits, but they require a license to sell any quantity less than twenty-eight gallons. Under the decision of Brown *v.* Maryland, it is admitted that the license acts cannot operate upon the right of the importer to sell. But, after the import shall have passed out of the hands of the importer, whether it remain in the original package or cask, or be broken up, it becomes mingled with other property in the State, and is subject to its laws. This is the predicament of the spirits in question.

A license to sell an article, foreign or domestic, as a merchant, or innkeeper or victualler, is a matter of police and of revenue, within the power of a State. It is strictly an internal regulation, and cannot come in conflict, saving the rights of the importer to sell, of any power possessed by Congress. It is said to reduce the amount of importation, by lessening the profits of the thing imported. The license is a charge upon the business, or profession, and not a duty upon the things sold. The same price is charged to every retailer of merchandise, or spirits, at the same place, without regard to the amount sold. This charge is in advance of any sales. It would be difficult to show that such a regulation reduced the amount of imported goods. But, if this were the effect of the license, would that make the acts unconstitutional?

The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Every thing prejudicial to the health or morals of a city may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded; and, in extreme cases, it may be thrown into the sea. This comes in direct conflict with the regulation of commerce; and yet no one doubts the local power. It is a power essential to self-preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity. He may resist that which does him harm, whether he be assailed by an assassin, or approached by poison. And it is the settled construction of every regulation of commerce, that, under the sanction of its general laws, no person can introduce into a community malignant diseases, or any thing which contaminates its morals, or endangers its safety. And this is an acknowledged principle applicable to all general regulations. Individuals in the enjoyment of their own rights must be careful not to injure the rights of others.

From the explosive nature of gunpowder, a city may exclude it. Now this is an article of commerce, and is not known to carry in-

fectious disease; yet, to guard against a contingent injury, a city may prohibit its introduction. These exceptions are always implied in commercial regulations, where the general government is admitted to have the exclusive power. They are not regulations of commerce, but acts of self-preservation. And although they affect commerce to some extent, yet such effect is the result of the exercise of an undoubted power in the State.

The objection is strongly and confidently urged, that a license may be refused under these laws, which would, in effect, prevent importation, as importation is only made to sell.

It is admitted that a State law which shall prohibit importations of foreign spirits, being repugnant to the commercial power in the federal government, and contrary to the act of Congress on that subject, would be void. The object of such a law would, upon its face, be a regulation of commerce, which is not within the powers of a State. But a State has a right to regulate the sale of this, as of every other imported article, out of the hands of the importer

The license system, as adopted in all the States, restrains persons from selling by retail, who have not taken a license; and a license to retail spirits is granted by the court, or some other body, at its discretion, and on certain conditions. This is the character of the law under consideration. The applicant to obtain a license must be recommended by a majority of the selectmen of the town, as a person of good moral character. Should this recommendation be refused improperly or unjustly, an appeal is given to the commissioners of the county. But the commissioners are not required to grant any licenses, "when, in their opinion, the public good does not require them to be granted."

There is no evidence in the record of a refusal to grant a license in this case. The plaintiff is charged with selling without a license; but it nowhere appears that he ever applied for one. This would seem to be conclusive. For if a State have a right to regulate the retail of foreign spirits, no one can retail them where a license is required without it. Now, that a State may do this no one doubts. And it is equally clear, if the plaintiff rests upon a prohibition to sell, it must be shown. This does not appear on the face of the law, and if, in the exercise of their discretion, the commissioners have refused all licenses, that is a matter of fact which must be established. On this ground alone, admitting the force of the arguments for the plaintiff, his case must fail.

But, not to rest the decision of so important a question on a defect of proof, we will consider the case as if the fact of refusal to grant the license were in the record.

The necessity of a license presupposes a prohibition of the right to sell as to those who have no license. For if a State may require a license to sell, it may, in the exercise of a proper discretion, limit the number of such licenses as the public good may seem to require.

This is believed to have been done under every system of licenses to retail spirits which has been adopted in the different States. And this limitation may, possibly, lessen the sale of the article. This may be the result of any regulation on the subject. But it constitutes no objection to the law. An innkeeper is forbidden to allow drunkenness in his house, and if this prohibition be observed, a less quantity of rum is sold. Is this unconstitutional, because it may reduce the importation of the article? Such an argument would be so absurd as to be at once rejected by every sound mind. No one could fail to see that the injunction was laid for the maintenance of good order and good morals. To reject this view would make the excess of the drunkard a constitutional duty, to encourage the importation of ardent spirits.

Such an argument would be advanced by no one, and no one would question either the constitutionality or expediency of the law which prohibits an innkeeper from encouraging drunkenness. And yet in this simple proposition is the argument answered against the constitutionality of the laws in question.

A discretion on this subject must be exercised somewhere, and it can be exercised nowhere but under the State authority. The State may regulate the sale of foreign spirits, and such regulation is valid, though it reduce the quantity of spirits consumed. This is admitted. And how can this discretion be controlled. The powers of the general government do not extend to it. It is in every aspect a local regulation, and relates exclusively to the internal police of the State.

It is said that the object of these laws is to prohibit the importation of foreign spirits. This is an inference which their language does not authorize. A license is only required to sell in less quantity than twenty-eight gallons. A greater quantity than this may be sold without restriction. But it is said, if the legislature may require a license for twenty-eight gallons, it may extend the limitation to three hundred gallons.

In answer to this it is enough to say, that the legislature has not done what is supposed by the plaintiff's counsel it might do. But if the legislature cannot extend the license to twenty-eight gallons, what shall be the constitutional limit? By what rule shall it be ascertained? Shall a gallon, a quart, or a pint be the limit? This is altogether arbitrary, and must depend upon the discretion of the law-making power,—the same discretion that imposes a tax, defines offences and prescribes their punishment, and which controls the internal policy of the State. Will it be contended that the legislature cannot exercise the power, as it may be exercised beyond the proper limit? This logic is not good when applied to the practical operations of the government. The argument is, power may be abused, therefore it cannot be exercised. What power dependent on human agency may not be abused?

In all matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and of civilization, new and vicious indulgences spring up, which require restraints that can only be imposed by the legislative power. When this power shall be exerted, how far it shall be carried, and where it shall cease, must mainly depend upon the evil to be remedied. Under the pretence of a police regulation, a State cannot counteract the commercial power of Congress. And yet, as has been shown, to guard the health, morals, and safety of the community, the laws of a State may prohibit an importer from landing his goods, and may sometimes authorize their destruction. But this exception to the operation of the general commercial law is limited to the existing exigency. Still, it is clear that a law of a State is not rendered unconstitutional by an incidental reduction of importation. And especially is this not the case, when the State regulation has a salutary tendency on society, and is founded on the highest moral considerations.

The police power of a State and the foreign commercial power of Congress must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct, and independent, and are essential to both governments. The one operates upon our foreign intercourse, the other upon the internal concerns of a State. The former ceases when the foreign product becomes commingled with the other property in the State. At this point the local law attaches, and regulates it as it does other property. The State cannot, with a view to encourage its local manufactures, prohibit the use of foreign articles, or impose such a regulation as shall in effect be a prohibition. But it may tax such property as it taxes other and similar articles in the State, either specifically or in the form of a license to sell. A license may be required to sell foreign articles, when those of a domestic manufacture are sold without one. And if the foreign article be injurious to the health or morals of the community, a State may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it. No one doubts this in relation to infected goods or licentious publications. Such a regulation must be made in good faith, and have for its sole object the preservation of the health or morals of society. If a foreign spirit should be imported containing deleterious ingredients, fatal to the health of those who use it, its sale may be prohibited.

When in the appropriate exercise of these federal and State powers, contingently and incidentally their lines of action run into each other; if the State power be necessary to the preservation of the morals, the health, or safety of the community, it must be main-

tained. But this exigency is not to be founded on any notions of commercial policy, or sustained by a course of reasoning about that which may be supposed to affect, in some degree, the public welfare. The import must be of such a character as to produce, by its admission or use, a great physical or moral evil. Any diminution of the revenue arising from this exercise of local power would be more than repaid by the beneficial results. By preserving, as far as possible, the health, the safety, and the moral energies of society, its prosperity is advanced.

In McCullough *v.* The State of Maryland, 4 Wheat. 428, this court say, — "It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation."

"The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representatives, to guard them against abuse."

Believing the laws of Massachusetts to regulate licenses for the sale of spirituous liquors to be constitutional, I affirm the judgment in this case.

ANDREW PEIRCE, JR., AND THOMAS W. PEIRCE, *v.* THE STATE OF NEW HAMPSHIRE.

This is a writ of error to the Supreme Court of New Hampshire, on a judgment given by that court sustaining the validity of the act of that State, "regulating the sale of wines and spirituous liquors," "approved 4th July, 1838"; which is alleged to be in violation of the constitution of the United States, and the revenue acts of Congress made in pursuance thereof.

The first section provides, "that if any person shall, without license from the selectmen of the town, &c., sell any wine, rum, gin, brandy, or other spirits, in any quantity, &c., such person, so offending, for each and every such offence, &c., shall pay a sum not exceeding fifty dollars," &c. The indictment charged the defendants in the State court with having sold one barrel of gin without a license.

On the trial, it was proved that the barrel of gin was purchased by the defendants in Boston, brought coastwise to the landing at Piscataqua Bridge, and thence to the defendants' store in Dover, and afterwards sold in the same barrel.

The views expressed by me in the case of Thurlow *v.* The

State of Massachusetts, at the present term, as regards the power of a State to require a license for the sale of spirituous liquors, apply equally to the present case. A State may require a license to sell ardent spirits of domestic manufacture, as well as foreign. And the only difference between this case and the one above cited is, that the defendants imported this barrel of gin from the State of Massachusetts to that of New Hampshire, where they sold it; and they claim the right of importers to sell without a license.

In the case of Brown *v.* The State of Maryland, 12 Wheat. 449, after sustaining the right of the importer to sell a package of foreign goods without a license, which an act of Maryland required, the court say, — "It may be proper to add, that we suppose the principles laid down in this case to apply equally to importations from a sister State."

This remark of the court was incidental to the question before it, and the point was not necessarily involved in the decision. Whilst the remark cannot fail to be considered with the greatest respect, coming as it did from a most learned and eminent chief justice, yet it cannot be received as authority. It must have been made with less consideration than the other points ruled in that important case.

The power to regulate commerce among the several States is given to Congress in the same words as the power over foreign commerce. But in the same article it is declared, that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another." And it is supposed that the declaration, "that no State, without the consent of Congress, shall lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," refers to foreign commerce.

A revenue to the general government could never have been contemplated from any regulation of commerce among the several States. Countervailing duties, under the Confederation, were imposed by the different States to such an extent as to endanger the confederacy. But this cannot be done under the constitution by Congress, in whom the power to regulate commerce among the States is vested.

The word *import*, in a commercial sense, means the goods or other articles brought into this country from abroad, — from another country. In this sense an importer is a person engaged in foreign commerce. And it appears that in the acts of Congress which regulate foreign commerce he is spoken of in that light. In Brown *v.* The State of Maryland, 12 Wheat. 443, the court say, the act of Maryland "denies to the importer the right of using the privilege which he has purchased from the United States, until he has purchased it from the State." And it was upon the ground that the tax was an additional charge or impost upon the thing imported,

which a State could not impose, that the above act was held to be unconstitutional.

But neither the facts nor the reasons of that case apply to a person who transports an article from one State to another. In some cases. the transportation is only made a few feet or rods, and generally it is attended with little risk; and no duty is paid to the federal or State government. And why should property, when conveyed over a State line, be exempt from taxation which is common to all other property in the State?

There is no act of Congress to which the license law, as applied to this case, can be held repugnant. And the general "power in Congress to regulate commerce among the several States," under the restrictions in the constitution, cannot affect the validity of the law. The constitution prohibits impost duties on a commercial interchange of commodities among the States. The tax in the form of a license, as here presented, counteracts no policy of the federal government, is repugnant to no power it can exercise, and is imposed by the exercise of an undoubted power in the State. The license system is a police regulation, and, as modified in the State of New Hampshire, was designed to restrain and prevent immoral indulgences, and to advance the moral and physical welfare of society.

The owner of the property, who purchased it in Massachusetts and transported it to New Hampshire, is not an importer in the sense in which that term is used in the case of Brown *v.* The State of Maryland. And there is nothing in the general reasoning of that case, or in the facts, which can bring into doubt the constitutionality of the New Hampshire law.

If the mere conveyance of property from one State to another shall exempt it from taxation, and from general State regulation, it will not be difficult to avoid the police laws of any State, especially by those who live at or near the boundary. If this tax had been laid on the property as an import into the State, the law would have been repugnant to the constitution. It would have been a regulation of commerce among the States, which has been exclusively given to Congress. One of the objects in adopting the constitution was, to regulate this commerce, and to prevent the States from imposing a tax on the commerce of each other. If this power has not been delegated to Congress, it is still retained by the States, and may be exercised at their discretion, as before the adoption of the constitution. For if it be a reserved power, Congress can neither abridge nor abolish it.

But this barrel of gin, like all other property within the State of New Hampshire, was liable to taxation by the State. It comes under the general regulation, and cannot be sold without a license. The right of an importer of foreign spirits to sell in the cask, without a license, does not attach to the plaintiffs in error, on account

of their having transported this property from Massachusetts to New Hampshire. I affirm the judgment of the State court.

JOEL FLETCHER *v.* THE STATE OF RHODE ISLAND.

This is a writ of error to the Supreme Court of Rhode Island, under the 25th section of the Judiciary Act of 1789. Fletcher was indicted for selling strong liquor, to wit, rum, gin, and brandy, in less quantity then ten gallons, in violation of the law of Rhode Island. From the evidence, it appeared that the brandy which he sold was purchased by him at Boston, in the State of Massachusetts, that it was imported into the United States from France for sale, and that the duties had been regularly paid at the port of Boston. The sale of the liquor was admitted by the defendant, as charged in the indictment.

In the defence it was insisted, that the license act was void, it being repugnant to that clause of the 8th section of the constitution of the United States which provides, "that the Congress shall have power to lay and collect taxes, duties, imports, and excises, to pay debts, and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States"; and is also repugnant to that clause of the 8th section which provides, "that Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes"; and also repugnant to that clause which declares, that "no State shall, without the consent of Congress, lay any imposts or duties on imports, except what may be absolutely necessary for executing its inspection laws, and the acts of Congress in pursuance of the aforesaid several clauses of said constitution," &c.

The Supreme Court of the State maintained the validity of the State statute, and to reverse that judgment this writ of error is prosecuted.

The opinions given by me in the cases of Thurlow *v.* The State of Massachusetts, and Peirce et al. *v.* The State of New Hampshire, decide, so far as I am concerned, this case. The first case related to the sale of spirits of foreign importation, not in the hands of the importer; the second, to domestic spirits transported from one State to another. And the indictment now under consideration relates to the sale of foreign spirits, purchased in Massachusetts and transported to Rhode Island. There is, however, one point made in this case, which was not embraced by the facts contained in either of the others. It was "agreed, that the town council of Cumberland, in Rhode Island, refused to grant any license for retailing strong liquors for a year from April, 1845, having been instructed to that effect by a town meeting." The effect of this proceeding was to prohibit the sale of spirituous liquors in the town of Cumberland in less quantities than ten gallons.

There is no constitutional objection to the exercise of this discretion under the authority of the State law. In the first place, no system of licenses to retail spirits has authorized the grant, except upon certain conditions. No one, it is presumed, can claim a license to retail spirits as a matter of right. Under the law of the State, a discretion is to be exercised, not only as regards the individuals who apply, but also as to the number that shall be licensed in each town. And, if it shall be determined that a certain town is not entitled to a license, it is not perceived how such a decision can be controlled. In the case of Fletcher, it seems that the town council, who have the power to make the grant, were influenced to refuse it by the popular vote of the town. A more satisfactory mode of instructing public officers, it would seem, could not be adopted.

This produces no restriction on the sale of spirits in any quantity exceeding ten gallons. And there is nothing in the record which shows that licenses are not granted in the adjacent towns within the State. But if this did appear, it would not avoid the force of the act. I think this regulation is clearly within the power of the State of Rhode Island, and, consequently, that the act is not repugnant to the constitution of the United States, or to any act of Congress passed in pursuance of it. I therefore affirm the judgment of the Supreme Court.

Mr. Justice CATRON.

PEIRCE AND ANOTHER *v.* NEW HAMPSHIRE.

Andrew Peirce and two others were indicted for selling one barrel of gin, contrary to a statute of New Hampshire, passed in 1838, which provides, that if any person shall, without license from the selectmen of the town where such person resides, sell any wine, rum, gin, brandy, or other spirits, in any quantity, or shall sell any mixed liquors, part of which are spirituous, such person so offending, for each offence, on conviction upon an indictment, shall forfeit and pay a sum not exceeding fifty dollars, nor less than twenty-five dollars, for the use of the county.

The barrel of gin had been purchased by the defendants at Boston, in the Commonwealth of Massachusetts, and was brought coastwise by water near to Dover, in New Hampshire, where it was sold in the same barrel and condition that it had been purchased in Boston. Part of the regular business of the defendants was to sell ardent spirits in large quantities.

The defendants' counsel contended, on the trial, that the statute of 1838 was unconstitutional and void, because the same is in violation of certain public treaties of the United States with Holland, France, and other countries, containing stipulations for the admission of spirits into the United States, and because it is repug-

nant to the two following clauses in the constitution of the United States, viz.: —

"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

"The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In answer to these objections, the court instructed the jury, that the statute of July 4, 1838, was not entirely void, if it might have an operation constitutionally in any case; and that, as far as this case was concerned, it could not be in violation of any treaty with any foreign power which had been referred to, permitting the introduction of foreign spirits into the United States, because the liquor in question here was proved to be American gin.

The court further instructed the jury, that this statute, as it regarded this case, was not repugnant to the clause in the constitution of the United States providing that no State shall, without the consent of Congress, lay any duty on imports or exports, because the gin in this case was not a foreign article, and was not imported into, but had been manufactured in, the United States.

The court further instructed the jury, that this State could not regulate commerce between this and other States; that this State could not prohibit the introduction of articles from another State with such a view, nor prohibit a sale of them with such a purpose; but that, although the State could not make such laws with such views and for such purposes, she was not entirely forbidden to legislate in relation to articles introduced from foreign countries or from other States; that she might tax them the same as other property, and might regulate the sale to some extent; that a State might pass health and police laws which would, to a certain extent, affect foreign commerce, and commerce between the States; and that this statute was a regulation of that character, and constitutional.

The jury found the defendants guilty, and the Court of Common Pleas fined them thirty dollars; from which they prosecuted their writ of error to the Superior Court of Judicature of New Hampshire, where the judgment was affirmed. The present writ of error is prosecuted, under the twenty-fifth section of the Judiciary Act of 1789, to reverse the judgment of the State court of New Hampshire, on the grounds above stated. And the question and the case presented for our consideration are, whether the State laws, and the judgment founded on them, are repugnant to the constitution of the United States. The court below having decided in favor of their validity, this is the only question that comes within our jurisdiction, although divers others were presented to and adjudged by the State court.

The importance of this case, as regards its bearing on the com-

merce among the States, and on the relations and rights of their citizens and inhabitants, is not to be disguised. To my mind it presents most delicate and difficult considerations.

The first objection, that the statute of New Hampshire violated certain treaties with Holland, France, &c., providing for the admission of ardent spirits, has no application to the case, as the spirits sold were not foreign, but American gin.

The second objection relies on the first article and tenth section of the constitution, which provides, that "no State shall lay any imposts or duties on imports or exports, nor any duty on tonnage," unless with the assent of Congress, &c., These are negative restrictions, where the constitution operates by its own force; but as no duty or tax was imposed on the gin introduced into New Hampshire from Massachusetts, either directly or indirectly, these prohibitions on the State power do not apply

The third objection proceeds on the clause, that "the Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," to which it is insisted the State statute is opposed. The power given to Congress is unrestricted, and broad as the subjects to which it relates; it extends to all lawful commerce with foreign nations, and in the same terms to all lawful commerce among the States; and "among" means between two only, as well as among more than two; if it was otherwise, then an intermediate State might interdict and obstruct the transportation of imports over it to a third State, and thereby impair the general power. The article in question was introduced from one State directly into another, and the first question is, Was it a subject of lawful commerce among the States, that Congress can regulate? That ardent spirits have been for ages, and now are, subjects of sale and of lawful commerce, and that of a large class, throughout a great portion of the civilized world, is not open to controversy; so our commercial treaties with foreign powers declare them to be, and so the dealing in them among the States of this Union recognizes them to be. But this condition of the subject-matter was met by the State decision on the ground, and on this only, "that the State might pass health and police laws which would, to a certain extent, affect foreign commerce and commerce between the States; and that the statute [of New Hampshire] was a regulation of that character, and constitutional."

This was the charge to the jury, and on it the verdict and judgment are founded, and which the State court of last resort affirmed. The law and the decision apply equally to foreign and to domestic spirits, as they must do on the principles assumed in support of the law. The assumption is, that the police power was not touched by the constitution, but left to the States as the constitution found it. This is admitted; and whenever a thing, from character or condi

tion, is of a description to be regulated by that power in the State, then the regulation may be made by the State, and Congress cannot interfere. But this must always depend on facts, subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce, or of commerce among the States. If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the State that it no longer belongs to commerce, or, in other words, is not a commercial article, then the State power may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the State and the federal power. That is say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of Gibbons *v.* Ogden, Brown *v.* The State of Maryland, and New York *v.* Miln.

What, then, is the assumption of the State court? Undoubtedly, in effect, that the State had the power to declare what should be an article of lawful commerce in the particular State; and, having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of Congress could not interfere. The exclusive State power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the State laws, and asserted as the State policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the State is attempted to be created, in a case where it did not previously exist.

If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the States, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated.

Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the State police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power.

as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated.

The same process of legislation and reasoning adopted by the State and its courts could bring within the police power any article of consumption that a State might wish to exclude, whether it belonged to that which was drank, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher grounds than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing. And in this connection it may be proper to say, that the three States whose laws are now before us had in view an entire prohibition from use of spirits and wines of every description, and that their main scope and object is to enforce exclusive temperance as a policy of State, under the belief that such a policy will best subserve the interests of society; and that to this end, more than to any other, has the sovereign power of these States been exerted; for it was admitted, on the argument, that no licenses are issued, and that exclusion exists, so far as the laws can produce the result,—at least, in some of the States,—and that this was the policy of the law. For these reasons, I think the case cannot depend on the reserved power in the State to regulate its own police.

Had the gin imported been "an import" from a foreign country, then the license law prohibiting its sale by the importer would be void. The reasons for this conclusion are given in my opinion on the case of Thurlow *v.* The Commonwealth of Massachusetts, and need not be repeated, and are founded on the case of Brown *v.* The State of Maryland. The next inquiry is, did it stand on the foot of "an import," coming, as it did, from another State? If it be true, as the State courts held it was, that Congress has the exclusive power to regulate commerce among the States (the States having none), and the gin introduced being an article of commerce, and the State license law being a regulation of commerce (as it was held by this court to be in the case of Brown *v.* The State of Maryland), then the State law is void, because the State had no power to act in the matter by way of regulation to any extent.

This narrows the controversy to the single point, whether the States have power to regulate their own mode of commerce among the States, during the time the power of Congress lies dormant, and has not been exercised in regard to such commerce.

Although some regulations have been made by Congress affecting the coasting trade, requiring manifests of cargoes where they exceed a certain value, to prevent smuggling, and for other purposes, still, no regulation exists affecting, in any degree, such an import as the one under consideration. It must find protection against the State law under the constitution, or it can have none. This is also

true as respects similar articles of commerce passing from State to State by land. Congress has left the States to proceed in this regard as they were proceeding when the constitution was adopted.

Is, then, the power of Congress exclusive? The advocates of this construction insist, that it has been settled by this court that the power to regulate commerce is exclusive, and can be exercised by Congress alone. And the inquiry in advance of further discussion is, Has the construction been thus settled? The principal case relied on is that of Gibbons *v.* Ogden, 9 Wheat. 1, in support of the assumption. In that case a monopoly had been granted to the inventers of machinery propelled by steam, which, when applied to vessels, forced them through the water. The law of monopoly of New York extended to the tide-waters, and for navigating these with two steamboats belonging to Gibbons, a bill was filed against him, and he was enjoined by the State courts of New York; and in his answer he relied on licenses granted under the act of 18th February, 1793, for enrolling and licensing ships and vessels to be employed in the coasting trade, and for regulating the same. This was the sole defence. The court first held that the power to regulate commerce included the power to regulate navigation also, as an incident to, and part of, commerce.

After discussing many topics connected with, or supposed to be connected with, the subject, the power of taxation was considered by the court, and the powers to tax in the States and the United States compared with the power to regulate commerce, and in this connection the chief justice, delivering the opinion of the court, said, —"But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce. In discussing the question, whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations Congress deemed proper to make are now in full operation. The sole question is, Can a State regulate commerce with foreign nations, and among the States, while Congress is regulating it?"

And then the court proceeds to discuss the effect of the licenses set up in Gibbon's answer, and gives a decree of reversal, on that sole question, in his favor. The decree says, — "This court is of opinion, that the several licenses to the steamboats the Stoudinger and the Bellona to carry on the coasting trade, which are set up by the appellant, Thomas Gibbons, in his answer, which were granted under an act of Congress passed in pursuance of the constitution of the United States, gave full authority to those vessels to navigate

the waters of the United States, by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the State of New York to the contrary notwithstanding." And then the State law is declared void, as repugnant to the constitution and laws of the United States. 9 Wheat. 240.

This case, then, decides that navigation was within the commercial power of the United States, and that a coasting license granted pursuant to an act of Congress, in the exercise of the power, was an authority under the supreme law to navigate the public waters of New York, notwithstanding the State law granting the monopoly. This decision was made in 1824. Three years after (1827) the case of Brown *v.* The State of Maryland came before the court. 12 Wheat. 419.

Brown, an importing merchant, had been indicted for selling packages of dry goods in the form they were imported, without taking out a license to sell by wholesale. To this he demurred, and the demurrer was sustained, on the ground that "imports" could be sold by the importer regardless of the State law, on which the indictment was founded. Two propositions were stated by the court, and the decision of the cause proceeded on them both, and was favorable to Brown:—First, The provision of the constitution which declares, that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports." And, second, That which declares Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

The first proposition has no application to the controversy before us, as here no tax or duty was imposed.

2. The court proceeds (p. 446) to inquire of the extent of the power, and says,—"It is complete in itself, and acknowledges no limitations, and is coextensive with the subject on which it operates." And for this Gibbons *v.* Ogden is referred to, as having asserted the same postulates. The opinion then urges the necessity that Congress should have power over the whole subject, and the power to protect the imported article in the hands of the importer; and proceeds to say,—"We think it cannot be denied what can be the meaning of an act of Congress which authorized importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser." "We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable."

Two points were decided on the second proposition:—1st. That a tax on the importer was a tax on the import.

2d. That "an import," which had paid a tax to the United States according to the regulations of commerce made by Congress, could not be taxed a second time in the hands of the importer.

Neither of these cases touch the question of exclusive power, nor

do I suppose it was intended by the writer of the opinions to approach that question, as he studiously guarded the opinion in the leading case of Gibbons *v.* Ogden against such an inference, and professedly followed the doctrines there laid down in Brown *v.* The State of Maryland.

The next case that came before the court was that of Willson et al. *v.* The Blackbird Creek Marsh Company, in 1829, 2 Peters, 257. The chief justice again delivered the opinion of the court, as he had done in the two previous cases. The company was authorized to make a dam across the creek under a State charter. The creek was a navigable tide-water; the dam was constructed, and the licensed sloop of Willson not being enabled to pass, he broke the dam, and the company sued him for damages; to which he pleaded, that the creek was a navigable highway, where the tide ebbed and flowed, and that he only did so much damage as to allow his vessel to pass. The plea was demurred to, and there was a judgment against Willson in the State court. It was insisted on his behalf in this court that the power to regulate commerce included navigation; and that navigable streams are the waters of the United States, and subject to the power of Congress; and the case of Gibbons *v.* Ogden was relied on. The chief justice in the opinion said: — "The counsel for the plaintiff in error insists that it comes in conflict with the powers of the United States to regulate commerce with foreign nations, and among the several States.

"If Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, we should feel not much difficulty in saying, that a State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question.

"We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

Here the adjudications end. But judges, who were of the court when the three cases cited were determined, differ as to the true meaning of the chief justice in the language employed in the case of Gibbons *v.* Ogden, in illustrating the constitution in aspects supposed to bear more or less on the questions before the court; such, for instance, as that the commercial power was a unit, and covered the entire subject-matter of commerce with foreign nations and

among the States; and that navigation was included in the power. In the case of New York *v.* Miln, 11 Peters, 102, Mr. Justice Thompson and Mr. Justice Story differed entirely as to what the language employed in the opinion in Gibbons *v.* Ogden meant, in regard to the true exposition of the constitution; — one contending that the language used had reference to the power of Congress, and to a case where it had been fully exercised; the other insisting that the opinion maintained the exclusive power in Congress to regulate commerce, and that the States had no authority to legislate, but were altogether excluded from interfering. This was Mr. Justice Story's opinion. I think it must be admitted that Chief Justice Marshall understood himself as Mr. Justice Thompson understood him, otherwise he could not have held as he did in the last case, in 1829, of Willson *v.* The Blackbird Creek Marsh Company. And as this case was an adjudication on the precise question whether the constitution of the United States, in itself, extinguished the powers of the States to interfere with navigation on tide-water, and as it was adjudged, in the case of Gibbons *v.* Ogden, that the power to regulate commerce included navigation as fully as if the clause had expressed it in terms, it is difficult to say that this case does not settle the question favorably to the exercise of jurisdiction on the part of the States, until Congress shall act on the same subject and suspend the State law in its operation. But, owing to the conflicting opinions of individual judges, it is deemed proper to treat the question as though it was an open one, in the aspect that this case presents it; and then the consideration arises, — Can a State, by its general laws, operating on all persons and property within its jurisdiction, regulate articles coming into the State from other States, and prohibit their sale, unless a license is obtained by the person bringing them in; and where no tax or duty is demanded of the person, or imposed on the article?

In this proposition, it is not intended to involve the consideration, that where Congress regulates a particular commerce by general laws, as where a tax is levied on some articles on being introduced from abroad, and others permitted to come in free, that all are regulated; this I admit in the instance put, and in all others of a like character. But as no general law of Congress has regulated commerce among the States, such a rule cannot apply here.

To a true understanding of the power conferred on Congress to regulate commerce among the States, it may be proper briefly to refer to their condition and acts before the constitution was adopted, in this respect. The prominent evil was, that they taxed the commerce of each other directly and indirectly; and to secure themselves from undue and opposing taxes, the constitution first provides, that Congress shall lay no tax on articles exported from any State second, that no State shall lay any imposts or duties on imports or exports; nor, third, lay any duty on tonnage, without

the consent of Congress, except so much as may be necessary for executing its inspection laws. These are prohibitions, to which the States have conformed.

But, as many general and all necessary local regulations existed when the constitution was adopted, and this, in all the States, affecting the end of commerce within their respective limits, the local regulations were continued, so far as the constitution left them in force. And they have been added to and accumulated to a great extent up to this time in the maritime States, not only as regards commerce among the States, but affecting foreign commerce also; the States, within their harbours and inland waters, have done almost every thing, and Congress next to nothing. So minute and complicated are the wants of commerce when it reaches its port of destination, that even the State legislatures have been incapable of providing suitable means for its regulation between ship and shore, and therefore charters, granted by the State legislatures, have conferred the power on city corporations. Owing to situation and climate, every port and place where commerce enters a State must have peculiarity in its regulations; and these it would be exceedingly difficult for Congress to make; nor could it depute the power to corporations, as the States do. The difficulties standing in the way of Congress are fast increasing with the increase of commerce and the places where it is carried on. And where it enters States through their inland borders, by land and water, the complication is not less, and especially on the large rivers. There, too, Congress has the undisputed power to regulate commerce coming from State to State; but as every village would require special legislation, and constant additions as it grew and its commerce increased, to deal with the subject on the part of Congress would be next to impossible in practice. I admit that this condition of things does not settle the question of contested power; but it satisfactorily shows that Congress cannot do what the States have done, are doing, and must continue to do, from a controlling necessity, even should the exclusive power in Congress be maintained by our decision. And this state of things was too prominently manifest for the convention to overlook it. Nor do I suppose they did so, for the following reasons.

The general rules of construction applicable to the negative and affirmative powers of grant in the constitution are commented on in the 32d number of the Federalist, in these terms: — "That, notwithstanding the affirmative grants of general authorities, there has been the most pointed care, in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the act, which justifies the position I have advanced, and

refutes every hypothesis to the contrary." That is, in favor of the State power. These remarks were made to quiet the fears of the people, and to clear up doubts on the meaning of the constitution, then before them for adoption by the State conventions. And it is an historical truth, never, so far as I know, denied, that these papers were received by the people of the States as the true exponents of the instrument submitted for their ratification. Proceeding on the principle of construction applicable to affirmative statutes, — that they stood together as a general rule, if there were no negative words, — and taking the doctrine laid down in the Federalist to be the true rule of interpretation, — that where the States were intended to be prohibited negative words had been used, — the States continued to do what they had previously done, and were not by negation prohibited from doing; that is to say, to exercise the powers conferred on Congress in arming, and organizing, and disciplining the militia, to pass bankrupt laws, and to regulate the details of commerce within their limits, coming from other States and foreign countries.

The exercise of the powers to regulate the militia, and to pass bankrupt laws, has not the approval of this court in the cases of Houston *v.* Moore, and in Ogden *v.* Saunders.

As to the existence of the power in the States in these two instances, there is no further controversy here or elsewhere.

And in regard to the third, Congress has stood by for nearly sixty years, and seen the States regulate the commerce of the whole country, more or less, at the ports of entry and at all their borders, without objection, and for this court now to decide that the power did not exist in the States, and that all they had done in this respect was void from the beginning, would overthrow and annul entire codes of State legislation on the particular subject. We would by our decision expunge more State laws and city corporate regulations than Congress is likely to make in a century on the same subject, and on no better assumption than that Congress and the State legislatures had been altogether mistaken as to their respective powers for fifty years and more. If long usage, general acquiescence, and the absence of complaint can settle the interpretation of the clause in question, then it should be deemed as settled in conformity to the usage by the courts.

And as Congress and the courts have conceded that the States may pass laws regulating the militia, and on the subject of bankruptcies, and that the affirmative grants of power to Congress in these instances did not deprive the States from exercising the power until Congress acted, it is now too late, under existing circumstances, for this court to say that the similar affirmative power to regulate commerce with foreign nations and among the States shall be held an exclusive power in Congress; as it could no more be done with consistency of interpretation, than with safety to the existing state of the country.

In proceeding on this moderate, and, as I think, prudent and proper construction, all further difficulty will be obviated in regard to the admission of property into the States; this the States may regulate, so they do not tax; and if the States (or any one of them) abuse the power, Congress can interfere at pleasure, and remedy the evil; nor will the States have any right to complain. And so the courts can interfere if the States assume to exercise an excess of power, or act on a subject of commerce that is regulated by Congress. As already stated, it is hardly possible for Congress to deal at all with the details of this complicated matter.

The case before us presents a fair illustration of the difficulty; all venders of spirits produced in New Hampshire are compelled to be licensed before they can lawfully sell; this is not controverted, and cannot be. To hold that the State license law was void, as respects spirits coming in from other States as articles of commerce, would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities that the retail trade would require; the consequence of which would be, that the dealers in New Hampshire would sell only spirits produced in other States, and that the products of New Hampshire would find an unrestrained market in the neighbouring States having similar license laws to those of New Hampshire.

For the sake of convenience, the views on which this opinion proceeds will be briefly restated.

1. It is maintained, that spirits and wines are articles belonging to foreign commerce and commerce among the States; and that Congress can regulate their introduction and transmission into and through the States so long as they belong to either class of such commerce, but no further.

2. That any State law whose provisions are repugnant to the existing regulations of Congress (within the above limit) is void, so far as it is opposed to the legislation of Congress.

3. That the police power of the States was reserved to the States, and that it is beyond the reach of Congress; but that such police power extends to articles only which do not belong to foreign commerce, or to commerce among the States, at the time the police power is exercised in regard to them; and that the fact of their condition is a subject proper for judicial ascertainment.

4. That the power to regulate commerce among the States may be exercised by Congress at pleasure, and the States cut off from regulating the same commerce at the same time it stands regulated by Congress; but that, until such regulation is made by Congress, the States may exercise the power within their respective limits.

5. That the law of New Hampshire was a regulation of commerce among the States in regard to the article for selling of which the defendants were indicted and convicted; but that the State law was constitutionally passed, because of the power of the State thus

to regulate; there being no regulation of Congress, special or general, in existence to which the State law was repugnant.

And, for these reasons, I think the judgment of the State court should be affirmed.

THURLOW *v.* MASSACHUSETTS.

The statute of Massachusetts provides, that no person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, as is provided in this chapter, on pain of forfeiting twenty dollars for each offence.

The plaintiff, Thurlow, was found guilty by a jury for violating this law, on which verdict the Supreme Judicial Court of Massachusetts pronounced judgment; and from which a writ of error was prosecuted to this court under the twenty-fifth section of the Judiciary Act of 1789. The bill of exceptions shows that some of the sales charged in the indictment were of foreign liquors; in regard to which the court directed the jury that the license law applied as well to imported spirits as to domestic. It was proved that the defendant below had sold in quantities of gallons, quarts, and pints. And the question submitted for our consideration is, whether the State law, and the judgment founded on it, are repugnant to the acts of Congress authorizing the importation of wines, brandies, and other foreign spirits; and it is proper to remark, that our jurisdiction and power to interfere involve the question merely of repugnance or no repugnance; if repugnance is found to exist, we must reverse, and if not, we must affirm. It follows, that the judicial ascertainment of the fact will end the controversy.

For the plaintiff in error it is insisted, that the State law and the judgment founded on it are repugnant to the acts of Congress authorizing the importation of foreign wines and spirits, and to their introduction into the United States on paying a prescribed tax. That the laws of the States cannot control the retail trade in such liquors; that if they can to any extent, they may prohibit their sale altogether, and by this means do that indirectly which cannot be done directly, that is to say, prohibit their introduction; that the purposes of wholesale importation being retail distribution, the two must go together; if not, the first is of no value; that importations reach our country in large masses for the sole purposes of diffusion and consumption, and unless Congress has the control of distribution until the imported article reaches the consumer, the power to admit and to regulate commerce in regard to it will be worthless, and little better han a barren theory, leaving us where we began in 1789. That any law, therefore, that prohibits consumption necessarily destroys importation; and the retail process being the ordinary means

to consumption, and indispensable to it, to refuse this means would wholly defeat the end Congress has protected; that is to say, consumption. On the soundness of this reasoning, the result of the controversy depends.

To this argument we answer, that under the power to regulate foreign commerce, Congress can protect every article belonging to foreign commerce, so long as it does belong to it, from the operation of a tax or a license, imposed by a State law, that obstructs or hinders the commerce. But the true inquiry here is, how long does the imported article so continue? The acts of Congress protect "imports," and prescribe the quantity and measure in which they shall be made; the question of more or less is within the competency of Congress, but how long the imported article continues to be "an import" is a different question, for so soon as it ceases to be so, then it is beyond the power conferred on Congress "to regulate foreign commerce," and that power cannot afford it further protection. This is the line of jurisdiction where the powers of Congress end, and where the powers of the States begin, when dealing respectively with the imported article. And such is the limit established in the case of Brown *v.* The State of Maryland. I do not mean to say that Congress may not protect an import for the purposes of transmission over land, in the form it was imported, from one State to another, for the purposes of distribution and sale by the importer, as this can be done under the power to regulate commerce among the States. The question under examination is, not what Congress may do, but what it has done. It has not permitted spirituous liquors to be imported in the quantities that they were sold by the plaintiff in error. And when the article passes by sale from the hands of the importer into the hands of another, either for the purposes of resale or of consumption, or is divided into smaller quantities, by breaking up the casks, packages, &c., by the importer, the article ceases to be a protected "import," according to the legislation of Congress as it now stands, and therefore the liquors sold in this instance did not belong to "foreign commerce," when sold at the retail house by single gallons, quarts, &c. When thus divided and sold in the body of the State, the foreign liquors became a part of its property, and were subject to be taxed, or to be regulated by licenses, like any other property owned within the State.

But while foreign liquors, imported according to the regulations of Congress, remain in the cask, bottle, &c., in the original form, then the importer may sell them in that form at the port of entry, or in any other part of the United States, nor can any State law hinder the importer from doing so; nor does it make any difference whether the imported article paid a tax on its introduction, or was admitted as a free article; until it passes from the hands of the importer, it is "an import," and belongs to regulated "foreign commerce," and is protected.

It follows from the principles stated, that the spirituous liquors sold by the defendant stood on no higher ground than domestic spirits did, and that domestic spirits are subject to the State authority as objects of taxation, or of license in restraint of their sale, is not a matter of controversy, and certainly cannot be here, under the twenty-fifth section of the Judiciary Act.

I admit as inevitable, that, if the State has the power of restraint by licenses to any extent, she has the discretionary power to judge of its limit, and may go to the length of prohibiting sales altogether, if such be her policy; and that if this court cannot interfere in the case before us, so neither could we interfere in the extreme case of entire exclusion, except to protect imports belonging to foreign commerce, as already defined. The reasons are obvious. We have no power to inquire into abuses (if such there be) inflicted by State authority on the inhabitants of the State, unless such abuses are repugnant to the constitution, laws, or treaties of the United States.

For the reasons above set forth, I think the judgment of the State court should be affirmed.

And as the case of Joel Fletcher against the State of Rhode Island depends on the same principles, to every extent, I think it must be affirmed also.

Mr. Justice DANIEL.

In the decision of the court, so far as it establishes the validity of the license laws of the States of Massachusetts, Rhode Island, and New Hampshire, I entirely concur; and had the opinions of judges in forming that decision been limited strictly to an inquiry into the compatibility of those laws with the constitution of the United States, or with a just exercise of State power (the only inquiry, in my apprehension, regularly before the court), I should have been spared the painful duty of disagreement with my brethren. To this inquiry, however, those opinions, according to my apprehension, are by no means restricted. The majority of the judges, in fulfilment of their own convictions, have seemed to me to go beside the questions regularly before them, and in this departure have propounded principles and propositions, against which, whensoever they may be urged as motives for action on my part, I shall feel myself bound most earnestly to protest. It has been said, that the principles here objected to have been already solemnly and fully adjudged and established, and should therefore be no longer assailed. The assertion as to the extent in which these principles have been ruled, or the solemnity with which they have been fixed and settled, may in the first place be justly questioned. It is believed that they have been directly adjudged in a single case only, and then under the qualification of an able dissent.*

* See 12 Wheaton, 449, the opinion of Thompson, Justice.

But should this assertion be conceded in its greatest latitude, my reply to it must be firmly and unhesitatingly this,—that in matters involving the meaning and integrity of the constitution, I never can consent that the text of that instrument shall be overlaid and smothered by the glosses of essay-writers, lecturers, and commentators. Nor will I abide the decisions of judges, believed by me to be invasions of the great *lex legum*. I, too, have been sworn to observe and maintain the constitution. I possess no sovereign prerogative by which I can put my conscience into commission. I must interpret exclusively as that conscience shall dictate. Could I, in cases of minor consequence, consent, in deference to others, to pursue a different course, I should, in instances like the present, be especially reluctant to place myself within the description of the poet,—"*Stat magni nominis umbra.*"

The doctrines which to me appear to have been gratuitously brought into this case are those which have been promulged in the reasoning of this court in the case of Brown *v.* The State of Maryland, reported in 12 Wheaton, 419,—doctrines (and I speak it with all due respect) which I conceive cannot, by correct induction, be derived from the constitution, nor even from the grounds assumed for their foundation in the reasoning of the court in that case; but which, on the contrary, appear to be wholly illogical and arbitrary. The doctrines adverted to are these. That under the operation of that provision in the constitution which confers on Congress the power of regulating commerce with foreign nations, &c., &c., and by the farther provision which prohibits to the States the power of levying imposts or duties on imports, merchandise, or property imported from abroad,—however completely its transit may have been ended, however completely it shall have passed beyond all agencies and obligations in reference to the federal government, and however absolutely, exclusively, and undeniably it shall have become the property, and passed into the possession, of the citizen resident within the State, and protected both in person and property by the laws of the State,—shall never become subject to taxation, in common with other property of the same citizen, whilst it shall remain in the bale, package, or form in which it shall have been imported, nor until (to use the language of the court) it shall have been "broken up and mingled with the general mass of property."

With regard to this phrase, "broken up and mingled with the mass of property," so often appealed to with the view to illustration, it may be worth while to remark, in passing, how often words introduced for the purpose of explanation are themselves the means of creating doubt or ambiguity! With respect to the phrase above mentioned, it may be retorted, that a person may import a steam-engine, a piano, a telescope, or a horse, and many other subjects, which could not be broken up in order to be mingled with the

general mass of property. If, then, this phrase is to be apprehended as signifying (and this alone seems its reasonable meaning) the appropriation of a subject imported in absolute private right and enjoyment, either positively or relatively, it surrenders the whole matter in dispute, and admits that all the property of the citizen, who is himself protected in his person and in the enjoyment of his property, is bound to contribute to the support of the government which yields this protection, whether he shall have imported that property, or purchased it at home.

By the 6th article and 2d clause of the constitution it is thus declared: — "That this constitution and the laws of the United States made in pursuance thereof, and treaties made under the authority of the United States, shall be the supreme law of the land."

This provision of the constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the general government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the constitution. Treaties, to be valid, must be made within the scope of the same powers; for there can be no "authority of the United States," save what is derived mediately or immediately, and regularly and legitimately, from the constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State. In cases of alleged conflict between a law of the United States and the constitution, or between the law of a State and the constitution or a statute of the United States, this court must pronounce upon the validity of either law with reference to the constitution; but whether the decision of the court in such cases be itself binding or otherwise must depend upon its conformity with, or its warrant from, the constitution. It cannot be correctly held, that a decision, merely because it be by the Supreme Court, is to override alike the constitution and the laws both of the States and of the United States. Let us test by these principles — believed to be irrefragable — the power over foreign commerce vested in Congress by the constitution; and also the positions sought to be deduced from that grant of power by the argument in Brown *v.* The State of Maryland. By art. 1, § 8, clause 4, of the constitution, it is declared, "that Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes." 'T is with the first of the grants in this article that we have now to deal. The commerce here

spoken of is that traffic between the people of the United States and foreign nations, by which articles are procured by purchase or barter from abroad, or by which the like subjects of traffic are transmitted from the United States to foreign countries; keeping in view always the essential characteristic of this commerce as stamped upon it by the constitution, namely, that it is commerce with foreign nations, or, in other words, that it is external commerce. By this, however, is not meant that it should be external in reference to geographical or territorial lines, but in reference to the parties, and the nature of their transactions. The power to regulate this commerce may properly comprise the times and places at which, the modes and vehicles in which, and the conditions upon which, it may as foreign commerce be carried on; but precisely at that point of its existence that it is changed from foreign commerce, at that point this power of regulation in the federal government must cease, the subject for the action of this power being gone. Independently of an express prohibition upon the States to lay duties on imports, this power of regulating foreign commerce may correctly imply a denial to the States of a right to interfere with existing regulations over subjects of foreign commerce; but they must be continuing, and still in reality, subjects of foreign commerce, and such they can no longer be after that commerce with regard to them has terminated, and they are completely vested as property in a citizen of a State, whether he be the first, second, or third proprietor; if this were otherwise, then, by the same reasoning, they would remain imports, or subjects of foreign commerce, through every possible transmission of title, because they had been once imported. Imports in a political or fiscal, as well as in common practical acceptation, are properly commodities brought in from abroad which either have not reached their perfect investiture or their alternate destination as property within the jurisdiction of the State, or which still are subject to the power of the government for a fulfilment of the conditions upon which they have been admitted to entrance; as, for instance, goods on which duties are still unpaid, or which are bonded or in public warehouses. So soon as they are cleared of all control of the government which permits their introduction, and have become the complete and exclusive property of the citizen or resident, they are no longer imports in a political, or fiscal, or common sense. They are like all other property of the citizen, and should be equally the subjects of domestic regulation and taxation, whether owned by an importer or his vendee, or may have been purchased by cargo, package, bale, piece, or yard, or by hogsheads, casks, or bottles. I can perceive no rational distinction which can be taken upon the circumstance of mere quantity, shape, or bulk; or on that of the number of transmissions through which a commodity may have passed from the first proprietor, or of its remaining still with the latter. The

objection, that a tax upon an article in bulk (the property of a citizen) is forbidden because it is a burden on foreign commerce, whilst a similar burden is permissible on the very same bulk or on fragments of the same article in the hands of his vendee, it would appear difficult to reconcile with sound reasoning. Every tax is alike a burden, whether it be imposed on larger or smaller subjects, and in either mode must operate on price, and consequently on demand and consumption. If, then, there was any integrity in the objection urged, it should abolish all regulations of retail trade, all taxes on whatever may have been imported.

It cannot be correctly maintained that State laws which may remotely or incidentally affect foreign commerce are on that account to be deemed void. To render them so, they must be essentially and directly in conflict with some power clearly invested in Congress by the constitution; and, I would add, with some regulation actually established by Congress in virtue of that power. In the case of Brown *v.* The State of Maryland, it is said by the court, that liberty to import implies unqualified liberty to sell at the place of importation. In the argument of this case, the proposition just mentioned does not, in all its amplitude, seem broad enough for counsel, who have contended that liberty to import implies on the part of the States a duty to encourage, if not to enforce, the consumption of foreign merchandise; arising, it is affirmed, from a farther duty incumbent on the States to regard *a priori* the acts of the federal government as wisest and best, and therefore imposing an obligation on the States for coöperation with them. These very exacting propositions, it is believed, can hardly be vindicated, either by the legitimate meaning of words, or any correct theory of the constitutional powers of Congress. It cannot be necessary here to institute a criticism upon the words *importation*, *sale*, *consumption*, in order to show either their etymological or ordinary acceptation, or in order to expose the fallacy of the aforegoing new and startling theory. Goods, moreover, may be imported into a country as into a commercial *entrepôt*, for reshipment to other markets, and not for consumption at all. But where importation may have been made with the direct view to sell, it does not follow, by necessary induction, that permission for the former implies permission for the latter, nor the power of granting the former the power of conferring the latter; much less, that it implies the power or the obligation on the part of the government to command or insure a sale. Whatever might be the case under governments in which power is either absolute or single, it is wholly otherwise under our system of confederated sovereignties. Here the power of the general government is emphatically delegated and limited, although it is paramount so far as it has been delegated; and when we look for this power of the government in relation to this matter in the constitution, we find it the power to regulate commerce with foreign nations; it

being the foreign character of that commerce alone which confers on Congress any power whatsoever with respect to it. It has been urged, that the importer pays a duty to the government for permission to introduce and vend his merchandise; that it would be unjust, therefore, to deprive him of the power of vending, as he never would have imported except with the expectation of selling. To this it may, in the first place, be replied, as has been remarked in the argument at the bar, that the question here is one of constitutional power; and if the federal government shall have transcended its legitimate powers, I ask, can it be right, in any view, to compensate those who may have suffered by the transgression, by authorizing unlimited reprisals upon the States? But in truth no such right as the one supposed is purchased by the importer, and no injury in any accurate sense is inflicted on him by denying to him the power demanded. He has doubtless in view the profits resulting from the sale of his commodities; but he has not purchased and cannot purchase from the government that which it could not insure to him, a sale independently of the laws and polity of the States. He has, under the legitimate power of the federal government to regulate foreign commerce, purchased the right to import, or introduce his merchandise, — the right to come in with it in quest of a market, and nothing beyond this. The habits, the tastes, the necessities, the health, the morals, and the safety of society form the true foundation of his calculations, or of any power or right which may be conceded to him for the sale of his merchandise, and not any supposed right in the federal government, in contravention of all these, to enforce such sale.

The want of integrity in the argument under examination is farther exposed, by showing that it will not cover the conclusion sought to be drawn from it. If the right of the importer to vend, and his exemption from taxation, are made to rest on the payment of duties to the federal government, on what foundation must be rested his right and his exemption, in reference to articles on which duties are neither paid nor exacted? Are these to be left exclusively the subjects of State regulation and State taxation? That they must be so left is a logical and inevitable conclusion from the proposition that the right to vend flows from the payment of duties. And then this argument involves the palpable absurdity, that merchandise which the government does not so strongly favor as to admit without duty shall remain intact and sacred, whilst merchandise which is so much preferred as to be admitted freely — nay, whose introduction is in effect invited and solicited by the federal government — may be burdened by the States at pleasure.

It has been insisted, that, as by treaty stipulations articles of foreign merchandise have been admitted for consumption (and much stress is laid upon this expression) in certain specified

quantities, consequently by such stipulations, forming the supreme law of the land, the free sale of these articles must be an absolute right. In what instances a treaty is or is not the supreme law, or is no law at all, I have already endeavoured to distinguish. Passing, therefore, that investigation, it seems very clear that the proposition just adverted to involves a great fallacy. The treaty stipulations here exemplified mean this, and nothing more, namely, that whereas certain enumerated commodities could heretofore be imported only in greater quantities, for the use of those who might choose to buy and consume them, they may hereafter be imported in lesser quantities. These stipulations no more signify that commodities shall be circulated and used free of all internal regulation, than they convey a positive mandate for their being purchased and consumed, eaten and drunk, *nolens volens*, or at all events. Every State that is in any sense sovereign and independent possesses, and must possess, the inherent power of controlling property held and owned within its jurisdiction, and in virtue and under the protection of its own laws, whether that control be exerted in taxing it, or in determining its tenure, or in directing the manner of its transmission; and this, too, irrespective of the quantities in which it is held or transferred, or the sources whence it may have been derived. Such a power differs entirely from an authority essentially extraneous in its character, — an authority limited and specific, by the very terms which confer it; restricted to action upon the progress of property on its way to complete investment under the laws of the State.

The license laws of Massachusetts, Rhode Island, and New Hampshire, now under review, impose no exaction on foreign commerce. They are laws simply determining the mode in which a particular commodity may be circulated within the respective jurisdictions of those States, vesting in their domestic tribunals a discretion in selecting the agents for such circulation, without discriminating between the sources whence commodities may have been derived. They do not restrict importation to any extent; they do not interfere with it, either in appearance or reality; they do not prohibit sales, either by wholesale or retail; they assert only the power of regulating the latter, but this entirely within the sphere of their peculiar authority.

These laws are, therefore, in violation neither of the constitution of the United States, nor of any law nor treaty made in pursuance or under the authority of the constitution. Viewing them in this charactor, my coöperation is given in maintaining them, whatever differences of opinion may exist in relation to their policy or necessity. But since, whilst extending to these laws their sanction and support, there have been advanced by others principles and opinions which to me appear to have their source not in the fountain of all legitimate power in this or any other department of the federal government, I cannot by silence seem to assent to those principles

and opinions, nor put from me the obligation of declaring my dissent from them.

Mr. Justice NELSON concurred in the opinions delivered by the Chief Justice and Mr. Justice Catron.

Mr. Justice WOODBURY.

I concur in the conclusion of my brethren as to the judgment which ought to be pronounced in all of the three license cases.

But, differing in some of the reasons for that judgment, and in the limitations and extent of some of the principles involved, and knowing the cases to possess much interest in the Circuit to which I belong, and from which they all come, I do not feel at liberty to refrain from briefly expressing my views upon them.

The paramount question involved in all the cases is, whether license laws by the States for selling spirituous liquors are constitutional. It is true that several other points are raised, as to evidence, the power of juries in criminal prosecutions to decide the law as well as the facts, and other questions not connected with the overruling of any clause in an act of Congress, or treaty, or the constitution, which was interposed in the defence. But, confined as we are to these last considerations in writs of error to State courts, it would be travelling out of our prescribed path to discuss at all either the other questions just alluded to, or some which have been long and ardently agitated in connection with this subject; such, for instance, as the expediency of the license laws, or the power of a State to regulate in any way the food and drink or clothing of its inhabitants. Fortunately, those questions belong to another and more appropriate forum, — the State tribunals.

But, looking to the relations which exist between the general government and the different State sovereignties, the question, whether the laws in these cases are within the power of the States to pass, without an encroachment on the authority of the general government, is one of those conflicts of laws between the two governments, involving the true extent of the powers in each as regards the other, which is very properly placed under our revision. In helping to discharge that duty on this occasion, I carry with me, as a controlling principle, the proposition, that State powers, State rights, and State decisions are to be upheld when the objection to them is not clear, equally proper as it may be for them, when the objection is clear, to give way to the supremacy of the authorized measures of the general government. See Constitution, art. 3.

It is not enough to fancy some remote or indirect repugnance to acts of Congress, — a "potential inconvenience," — in order to annul the laws of sovereign States, and overturn the deliberate decisions of State tribunals. There must be an actual collision, a direct inconsistency, and that deprecated case of "clashing sover-

eignties," in order to demand the judicial interference of this court to reconcile them. McCulloch *v.* Maryland, 4 Wheat. 316, 487; 1 Story's Com. on Const. 432.

These cases present two leading facts in respect to the material points, which ought first to be noticed. Neither of them is a prosecution against the importer of spirit or wine from a foreign country; and in neither has a duty been imposed, or a tax collected by the State from the original defendant, in connection with these articles. From this state of things, it follows, that, however much has been said as to the collision between these license laws and some former decisions of this court, no such direct issue is made up in either of them.

The case usually cited in support of such a proposition is very different. It is that of Brown *v.* Maryland, 12 Wheat. 419, which was a tax or license required, before the sale of an article, from the importer of it from a foreign country; and it was an importer alone who called the constitutionality of the law in question. What do these statutes, then, really seek to do? They merely attempt to regulate the sale of spirit or wine within the limits of States, in regard to the quantity sold at any one time without a license from the State authorities, — as in the cases from Massachusetts and Rhode Island; and in regard to any sale whatever without such license, — as in the case from New Hampshire.

It is true, also, that the quantity allowed to be sold in Massachusetts at any one time, without a license, is not so small as that which is permitted by Congress to be imported in kegs, and in Rhode Island is greater than that which Congress permits to be imported in bottles, and in New Hampshire is no quantity whatever. Yet neither of the laws unconditionally prohibits importations. Indeed, neither of them says any thing on the subject of importations. The first inquiry then recurs, whether they do not all stand on the same platform in respect to this, and without conflicting in this respect with any act of Congress. My opinion is that they do; as none of them, by prohibiting importations, oppose in terms any act of Congress which allows them, and none seem to me to conflict, in substance more than form, with entire freedom on that subject. Nor in either case do they, in point of fact, amount to a prohibition of importations in any quantity, however small. Under them, and so far as regards them, importations still go on abundantly into each of those States. It is manifest, also, whether as an abstract proposition or practical measure, that a prohibition to import is one thing, while a prohibition to sell without license is another and entirely different. The first would operate on foreign commerce, on the voyage. The latter affects only the internal business of the State after the foreign importation is completed and on shore. In the next place, in point of fact, neither of the laws goes so far as to prohibit in terms the sales, any more than the imports, of spirits.

On looking at the laws, this will be conceded. But if such a prohibition existed as to sales, what act of Congress would it come in collision with? None has ever been passed which professes to regulate or permit sales within the States as a matter of commerce. A good reason exists for this, as the subject of buying and selling within a State is one as exclusively belonging to the power of the State over its internal trade, as that to regulate foreign commerce is with the general government, under the broadest construction of that power.

And what power or measure of the general government would a prohibition of sales within a State conflict with, if it consisted merely in regulations of the police or internal commerce of the State itself? There is no contract, express or implied, in any act of Congress, that the owners of property, whether importers or purchasers from them, shall sell their articles in such quantities or at such times as they please within the respective States. Nor can they expect to sell on any other or better terms than are allowed by each State to all its citizens, or in a manner different from what has comported with the policy of most of the old States, as well before as since the constitution was adopted. Any other view would not accord with the usages of the country, or the fitness of things, or the unquestioned powers of all sovereign States, and, as is admitted, even of those in this Union, to regulate both their internal commerce and general police. The idea, too, that a prohibition to sell would be tantamount to a prohibition to import, does not seem to me either logical or founded in fact. For, even under a prohibition to sell, a person could import, as he often does, for his own consumption and that of his family and plantations; and, also, if a merchant, extensively engaged in commerce, often does import articles with no view of selling them here, but of storing them for a higher and more suitable market in another State, or abroad. This was the paramount object in the law of Congress, so often cited, as to the importation of kegs of fifteen gallons of brandy, — to have them in proper shape to be reëxported and carried on mules in Mexico, rather than to be sold for use here.

I should question the correctness of this objection even were it the doctrine in Brown *v.* Maryland, though I do not regard it as the point there settled, or the substantial reason for it. See Chief Justice Parker's Opinion in The State of New Hampshire *v.* Peirce, in Law Rep. for September, 1845. That point related rather to the want of power in a State to lay a duty on imports.

But it is earnestly urged, that, as these acts indirectly prohibit sales, such a prohibition of sales is indirectly a prohibition of importations, and importations are certainly regulated by Congress. It is necessary to scrutinize the grounds on which such circuitous reasoning and analogy rest. The sale of spirit being still permitted in all these States, as before remarked, it is first objected, that it is

permitted in certain quantities only, except under license, and that this restricts and lessens both the sales and imports. But the leading object of the license is to insure the sales of spirit in quantities not likely to encourage intemperance, and at places and times, and by persons, conducive to the same end. This is the case in New Hampshire, where none can be sold without license, while in the two other States, if no license is granted, the owner may sell in ten or twenty-eight gallons at a time; and in all the three States, the owner may, without license, consume what he imports, or store and reexport it for a market elsewhere. So the laws of most of the States forbid sales of property on the Sabbath. But who ever regarded that as prohibiting there entirely either their imports or sales?

It is further argued, however, that the license laws accomplish indirectly what is hostile to the policy of Congress, and thus conflict with the spirit of its acts, as much as if they prohibited absolutely both importations and sales. But if effecting this at all, it must be because they tend to lessen, and are designed to lessen, the consumption of foreign spirits, and thus help to reduce the imports and sales of them.

The case from New Hampshire is in this respect less open to objection than the others, the spirit there having been domestic. But as it came in coastwise from another State, it may involve a like principle in another view; and in its prohibitory character as to selling any liquor without license, the New Hampshire statute goes farther than either of the others.

Now, can it be maintained that every law which tends to diminish the consumption of any foreign or domestic article is unconstitutional, or violates acts of Congress? For that is the essence of this point. So far from this, whatever promotes economy in the use or consumption of any articles is certainly desirable, and to be encouraged by both the State and general governments. Improvements of that kind by new inventions and labor-saving machinery are encouraged by patents and rewards. More especially is it sound policy everywhere to lessen the consumption of luxuries, and in particular those dangerous to public morals. So in respect to foreign articles, the disuse of them is promoted by both the general and State governments in several other ways, rather than treating it as unconstitutional or against the acts of Congress; though the revenue as well as consumption be thereby diminished. Thus, the former orders the purchase of only domestic hemp for the navy, when it can be obtained of a suitable quality and price (Resolution, 18 February, 1843, 5 Statutes at Large, 648). And some of the States have often bestowed bounties on the growth of hemp, and of wheat, and other useful articles. An exception like this would cut so deep and wide into other usages and policy well established, as to need no further refutation. But this objection is

mixed up with another, — that the operation of these license laws is unconstitutional, because they lessen the amount of revenue which the general government might otherwise derive from the importation of that which is made abroad. It may be a sufficient reply to this, that Congress itself, by its own revenue system, has at times, by very high duties on some articles, meant to diminish their consumption, and reduce the revenue which otherwise might be derived from them if allowed to be introduced more largely under a small duty. And in this very article of spirits it has confessedly, from the foundation of the government, made the duties high, so as to discourage their use; and this in the very last tariff of 1846, though considered to be more emphatically a mere revenue measure. So its actual policy for fifteen years has been to lessen the use of spirit in both the army and navy; and by the third section of the act of Aug. 29th, 1842, ch. 267 (5 Statutes at Large, 546), this policy is recognized and encouraged by law.

So, when resorting to internal duties, for a like reason in part, stills and the manufacture of whiskey have been the first resorted to, and at last, in order to discourage the making of molasses into New England rum, the drawback on the former when manufactured into spirit and exported is allowed to stand now on a footing much less favorable than that on sugar when refined and exported.

Again, where States look to the most proper objects of domestic taxation, it is perfectly competent for them to assess a higher tax or excise, by way of license or direct assessment, on articles of foreign rather than domestic growth belonging to her citizens; and it ever has been done, however it may discourage the use of the former, or lessen the revenue which might otherwise be derived from them by the general government, or tend to reduce imports, as well as restrict the sale of them when considered of a dangerous character.

The ground is, therefore, untenable entirely, that a course of legislation which serves to discourage what is foreign, whether it be by Congress or the States, is for that reason alone contrary to the constitution, even if it tend at the same time to reduce the amount of revenue which would otherwise accrue from foreign imports, or from those of that particular article.

Importations, then, being left unforbidden in all of these cases, and the right to sell with a license not being prohibited in any of them, — nor without one prohibited, except qualifiedly in two of them, and in the other absolutely, but not affecting foreign imports at all in that case, as the spirit sold there was of domestic manufacture, — I pass to the next constitutional objection.

It has been contended, that the sum required to be paid for a license, and the penalty imposed for selling without one, are in the nature of a duty on imports, and thus come within the principle really settled in Brown *v.* Maryland, and thus conflict with the constitution. It is conceded, that a State is forbidden "to lay any im-

post or duties on imports" without the assent of Congress. (Art. 1, § 10.) But neither of these statutes purports to tax imports from abroad of foreign spirits, or imports from another State, either coastwise or by land, of either foreign or domestic spirits. The last mode is not believed to be that referred to in the constitution, and no regulation has ever been made by Congress concerning it when consisting of domestic spirits, as in the case of New Hampshire, except with a view to prevent smuggling. Act of Congress, Sept. 1, 1789, ch. 11, § 25, and Feb. 18, 1793, ch. 8, § 14; 1 Statutes at Large, 61, 309.

Nor does either of these statutes purport to tax the introduction of an article by the merchant importing it, much less to impose any duty on the article itself for revenue, in addition to what Congress requires. Neither of them appears to be, in character or design, a fiscal measure. They do not touch the merchandise till it has become a part of the property and capital of the State, and then merely regulate the disposal of it under license, as an affair of police and internal commerce. They might then even tax it as a part of the commercial stock in trade, and thus subject it, like other property, to a property tax, without being exposed to be considered an impost on imports, so as to conflict with the constitution. But the penalty and license in these cases are imposed *diverso intuitu*, and not as a tax of any kind. Hence they operate no more in substance than in form, as an impost of the prohibited character.

There is no pretence that the penalty is for revenue; and if the small sum taken for a license should ever exceed the expense and trouble of supervising the matter, and become a species of internal duty or excise, it would operate on spirit made in the State as well as that made elsewhere, and on others as well as importers, and, like any State tax on local property, or local trade, or local business, be free from any conflict with the constitution or acts of Congress. And what seems decisive in these causes as to this aspect of the question is, that neither of the persons here prosecuted was in fact an importer of foreign spirit or wines, or set up a defence of that kind as to himself, on the trial, which was overruled in the State courts.

Nor can the proposition, sometimes advanced, be vindicated, that this license, if a tax, and falling at times on persons not citizens, whether they belong to other States or are aliens, is either unjust or unconstitutional. It falls on them only when within the limits of the State, under the protection of its laws and seeking the privileges of its trade, and only in common with their own citizens. Such taxes are justifiable on principles of international law (Vattel, B. 8, ch. 10, § 132), and I can find no clause in the constitution with which they come in collision.

Again; it has been strenuously insisted on in these cases, and perhaps it is the leading position, that these license laws are virtually

regulations of foreign commerce; and hence, when passed by a State, are exercising a power exclusively vested in the general government, and therefore void. This is maintained, whether they actually conflict with any particular act of Congress or not. But, dissenting from any such definition of that power, as thus exclusive and thus abrogating every measure of a State which by construction may be deemed a regulation of foreign commerce, though not at all conflicting with any existing act of Congress, or with any thing ever likely to be done by Congress, I shall not, on this occasion, go at length into the reasons for my dissent to the exclusive character of this power, because these license laws are not, in my opinion, regulations of foreign commerce, and in a recent inquiry on the circuit I have gone very fully into the question. The United States *v.* New Bedford Bridge, in Massachusetts District.

My reasons are in brief, —

1. The grant is in the same article of the constitution, and in like language, with others which this court has pronounced not to be exclusive, e. g. the regulation of weights and measures, of bankruptcy, and disciplining the militia.

2. There is nothing in its nature, in several respects, to render it more exclusive than the other grants, but, on the contrary, much in its nature to permit and require the concurrent and auxiliary action of the States. But I admit, that, so far as regards the uniformity of a regulation reaching to all the States, it must in these cases, of course, be exclusive; no State being able to prescribe rules for others as to bankruptcy, or weights and measures, or the militia, or for foreign commerce. A want of attention to this discrimination has caused most of the difficulty. But there is much in connection with foreign commerce which is local within each State, convenient for its regulation and useful to the public, to be acted on by each till the power is abused or some course is taken by Congress conflicting with it. Such are the deposit of ballast in harbours, the extension of wharves into tide-water, the supervision of the anchorage of ships, the removal of obstructions, the allowance of bridges with suitable draws, and various other matters that need not be enumerated, beside the exercise of numerous police and health powers, which are also by many claimed upon different grounds.

This local, territorial, and detailed legislation should vary in different States, and is better understood by each than by the general government; and hence, as the colonies under an empire usually attend to all such local legislation within their limits, leaving only general outlines and rules to the parent country at home, as towns, cities, and corporations do it through by-laws for themselves, after the State legislature lays down general principles, and as the war and navy departments and courts of justice make detailed rules under general laws, so here the States, not conflicting with any uniform and general regulations by Congress as to foreign com-

merce, must for convenience, if not necessity, from the very nature of the power, not be debarred from any legislation of a local and detailed character on matters connected with that commerce omitted by Congress. And to hold the power of Congress as to such topics exclusive, in every respect, and prohibitory to the States, though never exercised by Congress, as fully as when in active operation, which is the opposite theory, would create infinite inconvenience, and detract much from the cordial coöperation and consequent harmony between both governments, in their appropriate spheres. It would nullify numerous useful laws and regulations in all the Atlantic and commercial States in the Union.

If this view of the subject conflicts with opinions laid down *obiter* in some of the decisions made by this court (9 Wheat. 209; 12 ibid. 438; 16 Peters, 543), it corresponds with the conclusions of several judges on this point, and does not, in my understanding of the subject, contradict any adjudged case in point. 5 Wheat. 49; Willson *v.* Blackbird Creek Marsh Company, 2 Peters, 245; 11 ibid. 132; 14 ibid. 579; 16 ibid. 627, 664; 4 Wheat. 196.

But, without going farther into this question, it is enough here to say, that these license laws do not profess to be, nor do they operate as, regulations of foreign commerce. They neither direct how it shall be carried on, nor where, nor under what duties or penalties. Nothing is touched by them which is on shipboard, or between ship and shore; nothing till within the limits of a State, and out of the possession and jurisdiction of the general government.

It is objected, in another view, that such licenses for selling domestic spirit may affect the commerce in it between the States, which by the constitution is placed under the regulation of Congress as much as foreign commerce.

But this license is a regulation neither of domestic commerce between the States, nor of foreign commerce. It does not operate on either, or the imports of either, till they have entered the State and become component parts of its property. Then it has by the constitution the exclusive power to regulate its own internal commerce and business in such articles, and bind all residents, citizens or not, by its regulations, if they ask its protection and privileges; and Congress, instead of being opposed and thwarted by regulations as to this, can no more interfere in it than the States can interfere in regulation of foreign commerce. If the proposition was maintainable, that, without any legislation by Congress as to the trade between the States (except that in coasting, as before explained, to prevent smuggling), any thing imported from another State, foreign or domestic, could be sold of right in the package in which it was imported, not subject to any license or internal regulation of a State, then it is obvious that the whole license system may be evaded and nullified, either from abroad, or from a neighbouring State. And the more especially can it be done from the latter, as

imports may be made in bottles of any size, down to half a pint, of spirits or wines; and if its sale cannot be interfered with and regulated, the retail business can be carried on in any small quantity, and by the most irresponsible and unsuitable persons, with perfect impunity.

The apprehension that the States, by these license systems, are likely to impair the freedom of trade between each other, is hardly verified by the experience of a half-century. Their conduct has been so liberal and just thus far on this matter as never to have called for the legislation of Congress, which it clearly has the power to make in respect to the commerce between the States, whenever any occasion shall require its interposition to check imprudences or abuses on the part of any one of them towards the citizens of another. Some have objected, next, that these laws violate our foreign treaties, such as those, for example, with Great Britain and Prussia, which stipulate for free ingress and egress as to our ports, as well as for a participation in our interior trade. See 8 Statutes at Large, 116, 228, 378. But those arrangements do not profess to exempt their people from local taxation here, or local conformity to license systems, operating, as these State laws do, on their own citizens and their own domestic products in the same way, and to the same extent, as on foreign ones. And neither of those laws in this case forbid access to our ports, or importation into the several States, by the inhabitants of any foreign countries.

In settling the question whether these laws impugn treaties, or regulate either foreign commerce or that between the States, or impose a duty on imports, ordinary justice to the States demands that they be presumed to have meant what they profess till the contrary is shown. Hence, as these laws were passed by States possessing experience, intelligence, and a high tone of morals, it is neither legal nor liberal to attempt to nullify them by any forced construction, so as to make them regulations of foreign commerce, or measures to collect revenue by a duty on foreign imports, thus imparting to them a character different from that professed by their authors, or from that which, by their provisions and tendency, they appear designed for. These States are as incapable of duplicity or fraud in their laws, of meaning one thing and professing another, as the purest among their accusers; and while legitimate and constitutional objects are assigned, and means used which seem adapted to such ends, it is illiberal to impute other designs, and to construe their legislation as of a sinister character, which they never contemplated. Thus, on the face of them, these laws relate exclusively to the regulation of licensed houses and the sales of an article which, especially where retailed in small quantities, is likely to attract together within the State unusual numbers, and encourage idleness, wastefulness, and drunkenness. To mitigate, if not prevent, this last evil was undoubtedly their real design.

From the first settlement of this country, and in most other nations, ancient or modern, civilized or savage, it has been found useful to discountenance excesses in the use of intoxicating liquor. And without entering here into the question whether legislation may not, on this as other matters, become at times intemperate, and react injuriously to the salutary objects sought to be promoted, it is enough to say, under the general aspect of it, that the legislation here is neither novel nor extraordinary, nor apparently designed to promote other objects than physical, social, and moral improvement. On the contrary, its tendency clearly is to reduce family expenditures, secure health, lessen pauperism and crime, and cooperate with, rather than counteract, the apparent policy of the general government itself in respect to the disuse of ardent spirit.

They aim, then, at a right object. They are calculated to promote it. They are adapted to no other. And no other, or sinister, or improper view can, therefore, either with delicacy or truth, be imputed to them.

But I go further on this point than some of the court, and wish to meet the case in front, and in its worst bearings. If, as in the view of some, these license laws were really in the nature of partial or entire prohibitions to sell certain articles within the limits of a State, as being dangerous to public health and morals, or were virtual taxes on them as State property in a fair ratio with other taxation, it does not seem to me that their conflict with the constitution would, by any means, be clear. Taking for granted, till the contrary appears, that the real design in passing them for such purposes is the avowed one, and especially while their provisions are suited to effect the professed object, and nothing beyond that, and do not apply to persons or things, except where within the limits of State territory, they would appear entirely defensible as a matter of right, though prohibiting sales.

Whether such laws of the States as to licenses are to be classed as police measures, or as regulations of their internal commerce, or as taxation merely, imposed on local property and local business, and are to be justified by each or by all of them together, is of little consequence, if they are laws which from their nature and object must belong to all sovereign states. Call them by whatever name, if they are necessary to the well-being and independence of all communities, they remain among the reserved rights of the States, no express grant of them to the general government having been either proper, or apparently embraced in the constitution. So, whether they conflict or not indirectly and slightly with some regulations of foreign commerce, after the subject-matter of that commerce touches the soil or waters within the limits of a State, is not perhaps very material, if they do not really relate to that commerce, or any other topic within the jurisdiction of the general government.

As a general rule, the power of a State over all matters not granted away must be as full in the bays, ports, and harbours within her territory, *intra fauces terræ*, as on her wharves and shores, or interior soil. And there can be little check on such legislation, beyond the discretion of each State, if we consider the great conservative reserved powers of the States, in their quarantine or health systems, in the regulation of their internal commerce, in their authority over taxation, and, in short, every local measure necessary to protect themselves against persons or things dangerous to their peace and their morals.

It is conceded that the States may exclude pestilence, either to the body or mind, shut out the plague or cholera, and, no less, obscene paintings, lottery tickets, and convicts. Holmes *v.* Jennison et al., 14 Peters, 568; 9 Wheat. 203; 11 Peters, 133. How can they be sovereign within their respective spheres, without power to regulate all their internal commerce, as well as police, and direct how, when, and where it shall be conducted in articles intimately connected either with public morals, or public safety, or the public prosperity? See Vattel, B. 1, ch. 19, §§ 219, 231.

The list of interdicted articles and persons is a long one in most European governments, and, though in some cases not very judicious or liberal, is in others most commendable; and the exclusion of opium from China is an instance well known in Asia, and kindred in its policy. The introduction and storage of gunpowder in large quantities is one of those articles long regulated and forbidden here. New York *v.* Miln, 11 Peters, 102. Lottery tickets and indecent prints are also a common subject of prohibition almost everywhere. 6 Greenleaf, 412; 4 Blackford, 107. See the tariff of 1842; 5 Stat. at Large, 566, § 28. And why not cards, dice, and other instruments for gaming, when thought necessary to suppress that vice? In short, on what principle but this rests the justification of the States to prohibit gaming itself, wagers, champerty, forestalling, — not to speak of the debatable cases of usury, marriage brokage bonds, and many other matters deemed either impolitic or criminal?

It might not comport with the usages or laws of nations to impose mere transit duties on articles or men passing through a State, and however resorted to in some places and on some occasions, it is usually illiberal, as well as injudicious. Vattel, B. 8, ch. 10. And if resorted to here, in respect to the business or imports of citizens of other States, might clearly conflict with some provisions of the constitution conferring on them equal rights, and be a regulation of the commerce between the States, the power over which they have expressly granted to the general government. But the present case is not of that character. Nor would it be, if prohibiting sales within the acknowledged limits of a State, in cases affecting public morals or public health. Nor is there in this case

any complaint, either by a foreign merchant or foreign nation, that treaties are broken; or by any of our own States or by Congress, that its acts or the constitution have been violated.

There are additional illustrations of such powers, existing on general principles in all independent states, given in Puffendorf, B. 8, ch. 5, § 30, as well as in various other writers on national law. And those exercised under what he terms "sovereign or transcendental propriety" (§ 7th), and those which we class under the right of "eminent domain," are recognized in the fifth amendment to the constitution itself, and go far beyond this.

Much more is there an authority to forbid sales, where an authority exists both to seize and destroy the article itself, as is often the case at quarantine.

So the power to forbid the sale of *things* is surely as extensive, and rests on as broad principles of public security and sound morals, as that to exclude *persons*. And yet who does not know that slaves have been prohibited admittance by many of our States, whether coming from their neighbours or abroad? And which of them cannot forbid their soil from being polluted by incendiaries and felons from any quarter?

Nor is there in my view any power conferred on the general government which has a right to control this matter of internal commerce or police, while it is fairly exercised so as to accomplish a legitimate object, and by means adapted legally and suitably to such end alone. New Hampshire has, for many years, made it penal to bring into her limits paupers even from other States; and this is believed to be a power exercised widely in Europe among independent nations, as well as in this country among the States. New Hampshire Revised Statutes, *Paupers*, 140.

It is the undoubted and reserved power of every State here, as a political body, to decide, independent of any provisions made by Congress, though subject not to conflict with any of them when rightful, who shall compose its population, who become its residents, who its citizens, who enjoy the privileges of its laws, and be entitled to their protection and favor, and what kind of property and business it will tolerate and protect. And no one government, or its agents or navigators, possess any right to make another State, against its consent, a penitentiary, or hospital, or poor-house farm for its wretched outcasts, or a receptacle for its poisons to health, and instruments of gambling and debauchery. Indeed, this court has deliberately said,—"We entertain no doubt whatsoever, that the States, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers." Prigg *v.* Pennsylvania, 16 Peters, 625.

There may be some doubt whether the general government or each State possesses the prohibitory power, as to persons or property of certain kinds, from coming into the limits of the State. But it must exist somewhere; and it seems to me rather a police power, belonging to the States, and to be exercised in the manner best suited to the tastes and institutions of each, than one anywhere granted or proper to the peculiar duties of the general government. Or, if vested in the latter at all, it is but concurrent. Hence, when the latter prohibited the import of obscene prints in the tariff of 1842, it was a novelty, and was considered by some more properly to be left to the States, as it opened the door to a prohibition, or to prohibitory duties, to many articles by the general government which some States might desire, but others not wish to come in as competitors to their own manufactures. But, as previously shown, to prohibit sales is not the same power, nominally or in substance, as to prohibit imports.

It is possible, that, under our system of double governments over one and the same people, the States cannot prohibit the mere arrival of vessels and cargoes which they may deem dangerous in character to their public peace, or public morals, or general health. This might, perhaps, trench on foreign commerce. Nor can they tax them as imports. This might trench on that part of the constitution which forbids States to lay duties on imports. But after articles have come within the territorial limits of States, whether on land or water, the destruction itself of what contains disease and death, and the longer continuance of such articles within their limits, or the terms and conditions of their continuance, when conflicting with their legitimate police, or with their power over internal commerce, or with their right of taxation over all persons and property under their protection and jurisdiction, seems one of the first principles of State sovereignty, and indispensable to public safety. Such extraordinary powers, I concede, are to be exercised with caution, and only when necessary or clearly justifiable in emergencies, on sound and constitutional principles; and, if used too often, or indiscreetly, would open a door to much abuse. But the powers seem clearly to exist in the States, and ought to remain there; and though, in this instance, they are not used to this extent, but still, as respectable minorities within these three States believe not to be useful, and as some other States do not think deserving imitation, yet they are used as the competent and constitutional power within each has judged to be proper for its own welfare, and as does not appear to be repugnant to any part of the constitution, or a treaty, or an act of Congress. They must, therefore, not be interfered with by this court, and the more especially as one reason why these powers have been left with the States is, that the subject-matter of them is better understood by each State than by the Union; and the policy and opinions and usages of one

State in relation to some of them may be very unlike those of others, and therefore require a different system of legislation. Where can such a power also be safer lodged than with those public bodies, or States, who are themselves to be the greatest sufferers in interest and character by an improper use of it? If it should happen at any time to be exercised injudiciously, that circumstance would furnish a ground for an appeal rather to the intelligence and prudence of the State, in respect to its modification or repeal, than an authority for this court, by a writ of error, to interfere with the well-considered decision of a State court, and reverse it, and pronounce a State law null and void, merely on that account.

Many State laws are such, that their expediency and justice may be doubted widely, and by this tribunal; but this confers no authority on us to nullify them; nor is any such authority, for such a cause, conferred on Congress by any part of the constitution.

The States stand properly on their reserved rights, within their own powers and sovereignty, to judge of the expediency and wisdom of their own laws; and while they take care not to violate clearly any portion of the constitution or statutes of the general government, our duty to that constitution and laws, and our respect for State rights, must require us not to interfere.

Mr. Justice GRIER.

I concur with my brethren in affirming the judgment in this and the preceding cases on the same subject, but for reasons differing somewhat from those expressed by the other members of the court; and as I concurred mainly with the opinion delivered by Mr. Justice McLean in the case of Thurlow v. Massachusetts, I had concluded to be silent, and therefore am not prepared to express my views at length. I take this occasion, however, to remark, that the true question presented by these cases, and one which I am not disposed to evade, is, whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime. I do not consider the question of the exclusiveness of the power of Congress to regulate commerce as necessarily connected with the decision of this point.

It has been frequently decided by this court, "that the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the constitution of the United States; and that consequently, in relation to these, the authority of a State is complete, unqualified, and conclusive." Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals, must come within this category.

As subjects of legislation, they are from their very nature of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience, or luxury, to recede, when they come in conflict or collision, "*salus populi suprema lex.*"

If the right to control these subjects be "complete, unqualified, and exclusive" in the State legislatures, no regulations of secondary importance can supersede or restrain their operations, on any ground of prerogative or supremacy. The exigencies of the social compact require that such laws be executed before and above all others.

It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers, they operate on the ship which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo, and cast it overboard. The soldier and the sailor, though in the service of the government, are arrested, imprisoned, and punished for their offences against society. Paupers and convicts are refused admission into the country. All these things are done, not from any power which the States assume to regulate commerce or to interfere with the regulations of Congress, but because police laws for the preservation of health, prevention of crime, and protection of the public welfare, must of necessity have full and free operation, according to the exigency which requires their interference.

It is not necessary for the sake of justifying the State legislation now under consideration to array the appalling statistics of misery, pauperism, and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power, or of legislation, as between the States and the United States; each is acting within its sphere, and for the public good, and if a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousandfold in the health, wealth, and happiness of the people.

Order.

SAMUEL THURLOW *v.* THE COMMONWEALTH OF MASSACHUSETTS.

This cause came on to be heard on the transcript of the record from the Supreme Judicial Court, holden in and for the county of Essex, in the Commonwealth of Massachusetts, and was argued by counsel. On consideration whereof, it is now here ordered and ad-

judged by this court, that the judgment of the said Supreme Judicial Court in this cause be and the same is hereby affirmed, with costs.

Order.

JOEL FLETCHER *v.* THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Rhode Island and Providence Plantations, holden at Providence, within and for the county of Providence, and was argued by counsel. On consid ion whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed, with costs.

Order.

ANDREW PEIRCE, JUNIOR, AND THOMAS W. PEIRCE, *v.* THE STATE OF NEW HAMPSHIRE.

This cause came on to be heard on the transcript of the record from the Superior Court of Judicature in and for the first judicial district of the State of New Hampshire, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Superior Court of Judicature in this cause be and the same is hereby affirmed, with costs.